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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA

Plaintiff,

v.

ATOFINA CHEMICALS, INC.,
AND GENERAL METALS OF
TACOMA, INC.

Defendants.

CIVIL ACTION NO. _____

RD/RA CONSENT DECREE
HEAD OF HYLEBOS WATERWAY PROBLEM AREA
COMMENCEMENT BAY NEARSHORE/TIDEFLATS SUPERFUND SITE

CONSENT DECREE
Commencement Bay Nearshore/Tideflats
Superfund Site

United States Department of Justice
Environment & Natural Resources Division
Environmental Enforcement Section
P.O. Box 7611
Ben Franklin Station
Washington, DC 20044

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I. BACKGROUND

A. The United States of America ("United States"), on behalf of the Administrator of the United States Environmental Protection Agency ("EPA"), filed a complaint in this matter pursuant to Sections 106 and 107 of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §§ 9606, 9607.

B. The United States in its complaint seeks, inter alia: (1) reimbursement of costs incurred by EPA and the Department of Justice for response actions at the Hylebos Waterway Problem Areas ("Hylebos Waterway Problem Area") within the Commencement Bay Nearshore/Tideflats Superfund Site in Tacoma, Washington ("CB/NT Site"), together with accrued interest; and (2) performance of studies and response work by the defendants at the Hylebos Waterway Problem Area consistent with the National Contingency Plan, 40 C.F.R. Part 300 (as amended) ("NCP").

C. In accordance with the NCP and Section 121(f)(1)(F) of CERCLA, 42 U.S.C. § 9621(f)(1)(F), EPA notified the State of Washington (the "State") on December 26, 2000 of negotiations with potentially responsible parties regarding the implementation of the remedial design and remedial action for the Hylebos Waterway Problem Area, and EPA has provided the State with an opportunity to participate in such negotiations and be a party to this Consent Decree.

D. In accordance with Section 122(j)(1) of CERCLA, 42 U.S.C. § 9622(j)(1), EPA notified the Washington Department of Ecology, National Oceanic and Atmospheric Administration of the U.S. Department of Commerce, the Fish and Wildlife Service of the U.S. Department of Interior, the Puyallup Tribe of Indians, and the Muckleshoot Indian Tribe, and the Bureau of Indian Affairs on December 26, 2000 of negotiations with potentially responsible

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1 parties regarding the release of hazardous substances that may have resulted in injury to the
2 natural resources under the trusteeship of the Natural Resource Trustees and encouraged the
3 trustees to participate in the negotiation of this Consent Decree.

4 E. The defendants that have entered into this Consent Decree ("Settling
5 Defendants") do not admit any liability to the Plaintiff arising out of the transactions or
6 occurrences alleged in the complaint, nor do they acknowledge that the release or threatened
7 release of hazardous substances at or from the CB/NT Site and/or the Hylebos Waterway
8 Problem Area constitutes an imminent or substantial endangerment to the public health or
9 welfare or the environment.

10
11 F. Pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, EPA placed the Site on
12 the National Priorities List, set forth at 40 C.F.R. Part 300, Appendix B, by publication in the
13 Federal Register on September 8, 1983, 48 Fed. Reg. 40,658.

14 G. In response to a release or a substantial threat of a release of hazardous substances
15 at or from the CB/NT Site, EPA entered into a CERCLA Cooperative Agreement with the State
16 of Washington, through the Department of Ecology ("Ecology") to conduct a Remedial
17 Investigation and Feasibility Study ("RI/FS") for the Site pursuant to 40 C.F.R. § 300.430.

18
19 H. Ecology completed a Remedial Investigation ("RI") Report on contaminated
20 sediments and sources and the results were published in August 1985. The results of the
21 Feasibility Study ("FS") were published in February, 1989.

22 I. Pursuant to Section 117 of CERCLA, 42 U.S.C. § 9617, EPA published notice of
23 the completion of the FS and of the proposed plan for remedial action for the CB/NT Site, on
24 February 24, 1989, in a major local newspaper of general circulation. EPA provided an
25 opportunity for written and oral comments from the public on the proposed plan for remedial
26

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1 action. A copy of the transcript of the public meeting is available to the public as part of the
2 administrative record upon which the Regional Administrator based the selection of the response
3 action.

4 J. The decision by EPA on the remedial action to be implemented at the CB/NT Site
5 is embodied in a final Record of Decision ("ROD"), executed on September 30, 1989, on which
6 the State and Puyallup Tribe of Indians gave their concurrence. The ROD includes EPA's
7 explanations for any significant differences between the final plan and the proposed plan as well
8 as a responsiveness summary to the public comments. Notice of the final plan was published in
9 accordance with Section 117(b) of CERCLA.

10 K. The ROD concluded that the large study area, multiplicity of contaminant
11 sources, diversity of activities, and complexity of the CB/NT Site, required that response actions
12 be accomplished in seven (7) operable units managed primarily by EPA and Ecology, including
13 (1) Operable Unit 01 - CB/NT Sediments; (2) Operable Unit 02 - Asarco Tacoma Smelter; (3)
14 Operable Unit 03 - Tacoma Tar Pits; (4) Operable Unit 04 - Asarco Off-Property; (5) Operable
15 Unit 05 - CB/NT Sources; (6) Operable Unit 06 - Asarco Sediments; and (7) Operable Unit 07 -
16 Asarco demolition. EPA identified several "Problem Areas" in the ROD for further study and
17 evaluation. EPA identified two Problem Areas within the Hylebos Waterway. These are called
18 the Head of the Hylebos Waterway Problem Area and the Mouth of the Hylebos Waterway
19 Problem Area. This Consent Decree addresses Operable Unit 01 (sediments) within the portion
20 of the Hylebos Waterway known as the Head of the Hylebos Problem Area. Based upon the
21 information it possesses as of the date this Consent Decree is lodged, EPA has not identified
22 Settling Defendants as potentially responsible parties in any portion of the CB/NT Site other than
23 the Hylebos Waterway Problem Area.
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1 L. The ROD addresses both sediment remediation (Operable Unit 01) and source
2 control (Operable Unit 05). EPA has entered into Superfund Cooperative Agreements with the
3 State and the Puyallup Tribe of Indians for remedial activities at the CB/NT Site. Under a
4 Cooperative Agreement with Ecology, effective May 1, 1989, and in the ROD, EPA is
5 designated as the lead agency for remediation of contaminated sediments in the waterways and
6 Commencement Bay, and Ecology is the lead agency for source control of hazardous substances
7 from upland areas (down to the mean high tidal elevation of the waterways). Source control was
8 completed in the upland areas that were contributing contamination to the areas identified in the
9 ROD as requiring sediment remediation ("Problem Areas"). A support agency Cooperative
10 Agreement was entered into with the Puyallup Tribe.

11 M. As described in the RI/FS for the CB/NT Site, there are nine Problem Areas of
12 contaminated sediments and numerous sources of hazardous substances contamination. The
13 ROD addressed eight of the nine Problem Areas, including the Mouth of the Hylebos and the
14 Head of the Hylebos Problem Areas. The ninth Problem Area, the Asarco Sediments, is now a
15 separate operable unit of the CB/NT Site and is the subject of a separate ROD. This Consent
16 Decree addresses remediation of the Head of the Hylebos Waterway Problem Area consistent
17 with the ROD.
18

19 N. On November 29, 1993, six entities (collectively known as the Hylebos Cleanup
20 Committee or "HCC") entered into an Administrative Order on Consent ("HCC AOC") with
21 EPA for the preparation of, performance of, and reimbursement of oversight costs for Pre-
22 remedial Design Activities for the Hylebos Waterway Problem Areas. The objectives of the
23 HCC AOC were: (1) to perform pre-remedial design work for the Hylebos Waterway consistent
24 with the ROD; (2) to perform analyses and studies needed by EPA to select a Remediation Plan,
25 including an acceptable confined disposal site and any necessary mitigation which attains
26

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1 Sediment Quality Objectives identified in the ROD, and all applicable or relevant and
2 appropriate requirements; and (3) provide for recovery by EPA of its response and oversight
3 costs incurred with respect to the implementation of the AOC. By letter dated November 8,
4 2001, EPA confirmed that all activities required by the original Scope of Work to the HCC AOC
5 were performed, except remaining oversight billings, in accordance with Section XXVI of the
6 HCC AOC. A second amendment to the HCC AOC replaced the six original Respondents with
7 only ATOFINA Chemicals, Inc. and General Metals of Tacoma, Inc. and amended the Scope of
8 Work to be comprised of a Pilot Project to be conducted in the winter of 2001 and 2002. With
9 the exception of cost reimbursement and record keeping activities, the Settling Defendants have
10 performed all activities required by the HCC AOC.

11 O. On July 28, 1997, EPA issued an Explanation of Significant Difference (ESD) for
12 the CB/NT Site, in compliance with Section 117(c) of CERCLA, that explains differences in the
13 Remedial Action that significantly change, but do not fundamentally alter, the remedy selected in
14 the ROD. The 1997 ESD modified the cleanup level for remediation of marine sediments
15 contaminated with polychlorinated biphenyls (PCBs) at the CB/NT Site.

16
17 P. On August 3, 2000, EPA issued an ESD, in compliance with Section 117(c) of
18 CERCLA, that explains differences in the Remedial Action that significantly change, but do not
19 fundamentally alter, the remedy selected in the ROD. The ESD was a comprehensive document
20 addressing cleanup plans for two waterways within the CB/NT Site, selecting disposal sites for
21 all contaminated sediment yet to be dredged and confined from the CB/NT Site, as well as
22 providing performance standards and documenting other differences to the ROD. Based on the
23 studies and analysis conducted under the HCC AOC with respect to the Hylebos Waterway
24 Problem Area, the ESD provides details of: the areal extent of sediment contamination in the
25 Hylebos Waterway Problem Area and the volume of sediment that requires remediation;

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1 designation of areas that are projected to naturally recover within ten (10) years of remedial
2 action if not actively remediated; EPA's decision to dispose of contaminated sediments in Blair
3 Slip 1, St. Paul Waterway, and an upland regional landfill; performance standards for mitigation
4 for the Remedial Action; and the then estimated cost of the Remedial Action at the Hylebos
5 Waterway Problem Area. Notice and public comment were taken on the ESD and notice of the
6 final ESD was published in accordance with Section 117(c) of CERCLA. The State and the
7 Puyallup Tribe concurred on the ESD.

8
9 Q. Both Settling Defendants, General Metals of Tacoma, Inc., and ATOFINA
10 Chemicals, Inc., own or control property within and adjacent to the Hylebos Waterway needing
11 cleanup under the CB/NT ROD. General Metals addressed its contaminated intertidal property in
12 1999 under an Administrative Order on Consent for Removal Activities, No. 10-98-0133-
13 CERCLA, ("General Metals AOC") by placing a cap to contain contaminated sediments. Long-
14 term monitoring and maintenance of the action conducted under the General Metals AOC is as
15 set forth in the EPA-approved March 28, 2000 Sediment Post-Removal Site Control Plan and
16 will be conducted as part of the Work required under this Consent Decree and is incorporated in
17 to the Statement of Work, attached as Appendix B.

18 R. In 2001, Settling Defendants performed various response activities (including
19 sampling, and a pilot dredging project) as part of the Head of the Hylebos Site. Such activities
20 are described in the Statement of Work, and are components of the Work required under this
21 Consent Decree.

22
23 S. In order to maintain the cleanup schedule, among other reasons, EPA issued a
24 Unilateral Administrative Order for Remedial Design and Remedial Action to the Settling
25 Defendants on March 25, 2002 ("UAO"). The Parties anticipated replacing the UAO with this
26 Consent Decree.

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1 T. Remedial design and remedial action for other areas of the Hylebos Waterway
2 Problem Area not addressed by this Consent Decree, referred to as the Mouth of the Hylebos
3 Waterway Problem Area, are being performed by other settling defendants in a separate
4 Unilateral Administrative Order for Remedial Design and Remedial Action issued to the Port of
5 Tacoma and Occidental Chemical Corporation ("Mouth of Hylebos UAO").

6 U. Based on the information presently available to EPA, EPA believes that the Work
7 will be properly and promptly conducted by the Settling Defendants if conducted in accordance
8 with the requirements of this Consent Decree and its appendices.
9

10 V. Solely for the purposes of Section 113(j) of CERCLA, the Remedial Action
11 selected by the ROD and the Work to be performed by the Settling Defendants shall constitute a
12 response action taken or ordered by the President.

13 W. The Parties recognize, and the Court by entering this Consent Decree finds, that
14 this Consent Decree has been negotiated by the Parties in good faith and implementation of this
15 Consent Decree will expedite the cleanup of the Site, and will avoid prolonged and complicated
16 litigation between the Parties, and that this Consent Decree is fair, reasonable, and in the public
17 interest.
18

19 NOW, THEREFORE, it is hereby Ordered, Adjudged, and Decreed:
20

21 II. JURISDICTION

22 1. This Court has jurisdiction over the subject matter of this action pursuant to 28
23 U.S.C. §§ 1331 and 1345, and 42 U.S.C. §§ 9606, 9607, and 9613(b). This Court also has
24 personal jurisdiction over the Settling Defendants. Solely for the purposes of this Consent
25 Decree and the underlying complaint, Settling Defendants waive all objections and defenses that
26

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1 they may have to jurisdiction of the Court or to venue in this District. Settling Defendants shall
2 not challenge the terms of this Consent Decree or this Court's jurisdiction to enter and enforce
3 this Consent Decree.

4
5 III. PARTIES BOUND

6 2. This Consent Decree applies to and is binding upon the United States and upon
7 Settling Defendants and their heirs, successors and assigns. Any change in ownership or
8 corporate status of a Settling Defendant including, but not limited to, any transfer of assets or real
9 or personal property, shall in no way alter such Settling Defendant's responsibilities under this
10 Consent Decree.

11 3. Settling Defendants either directly or through the Supervising Contractor shall
12 provide a copy of this Consent Decree to each contractor hired to perform the Work (as defined
13 below) required by this Consent Decree and to each person representing any Settling Defendant
14 with respect to the Head of the Hylebos Site or the Work and shall condition all contracts entered
15 into hereunder upon performance of the Work in conformity with the terms of this Consent
16 Decree. Settling Defendants or their contractors shall provide written notice of the Consent
17 Decree to all subcontractors hired to perform any portion of the Work required by this Consent
18 Decree. Settling Defendants shall nonetheless be responsible for ensuring that their contractors
19 and subcontractors perform the Work contemplated herein in accordance with this Consent
20 Decree. With regard to the activities undertaken pursuant to this Consent Decree, each
21 contractor and subcontractor shall be deemed to be in a contractual relationship with the Settling
22 Defendants within the meaning of Section 107(b)(3) of CERCLA, 42 U.S.C. § 9607(b)(3).
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IV. DEFINITIONS

4. Unless otherwise expressly provided herein, terms used in this Consent Decree that are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them in CERCLA or in such regulations. Whenever terms listed below are used in this Consent Decree or in the appendices attached hereto and incorporated hereunder, the following definitions shall apply:

“Cash out Consent Decree” shall mean the Consent Decree in United States v. Mary Anderson et al., Civil Action No. C03-5107 (W.D. WA 2003).

“CB/NT Site” shall mean the Commencement Bay Nearshore/Tideflats Superfund Site, encompassing approximately 10-12 square miles of shorelines, intertidal areas, bottom sediments, water, and adjacent lands located in Tacoma, Washington. The upland boundaries of the CB/NT Site are defined according to the contours of localized drainage basins that flow into the marine waters. The marine boundary of the CB/NT Site is limited to the shoreline, intertidal areas, bottom sediments, and water of depths less than 60 feet below mean lower low water. The nearshore portion of the CB/NT Site is defined as the area along the Ruston shoreline from the Mouth of City Waterway to Point Defiance. The tideflats portion of the CB/NT Site includes the Hylebos, Blair, Sitcum, Milwaukee, St. Paul, Middle, Wheeler-Osgood, and Thea Foss waterways; the Puyallup River upstream to the Interstate 5 bridge; and the adjacent land areas. The CB/NT Site encompasses the Hylebos Waterway Problem Area (containing the Mouth/Middle and Head of Hylebos Waterway Problem Areas).

“CERCLA” shall mean the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. §§ 9601 *et seq.*

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1 “Consent Decree” shall mean this Consent Decree and all appendices attached hereto
2 (listed in Section XXIX) as they may be amended in accordance with this Consent Decree. In the
3 event of conflict between this Consent Decree and any appendix, this Decree shall control.

4 “Day” shall mean a calendar day unless expressly stated to be a working day. “Working
5 day” shall mean a day other than a Saturday, Sunday, or Federal holiday. In computing any
6 period of time under this Consent Decree, where the last day would fall on a Saturday, Sunday,
7 or Federal holiday, the period shall run until the close of business of the next working day.

8
9 “Effective Date” shall be the effective date of this Consent Decree as provided in
10 Paragraph 111.

11 “EPA” shall mean the United States Environmental Protection Agency and any successor
12 departments or agencies of the United States.

13
14 “Ecology” shall mean the Washington State Department of Ecology and any successor
15 departments or agencies of the State.

16 “Future Oversight Costs” shall mean that portion of Future Response Costs that EPA
17 incurs in monitoring and supervising Performing Defendant’s performance of the Work to
18 determine whether such performance is consistent with the requirements of this Consent Decree,
19 including costs incurred in reviewing plans, reports and other documents submitted pursuant to
20 this Consent Decree, as well as, all costs incurred in overseeing implementation of the Unilateral
21 Administrative Order for Remedial Design and Remedial Action (EPA Docket No. CERCLA.
22 10-2002-0065) that EPA issued to the Settling Defendants on March 25, 2002 and costs incurred
23 in overseeing implementation of the Work in this Consent Decree; however, Future Oversight
24 Costs do not include, *inter alia*: the costs incurred in overseeing implementation of Unilateral
25 Administrative Order for Remedial Design and Remedial Action (EPA Docket No. CERCLA 10-
26

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1 2002-0064) that EPA issued to the Port of Tacoma, Occidental Chemical Corporation and OCC
2 Tacoma, Inc., on March 25, 2002, the costs incurred in overseeing implementation of Unilateral
3 Administrative Order for Removal Activities (EPA Docket No. CERCLA 10-2002-0066) that
4 EPA issued to the Occidental Chemical Corporation and OCC Tacoma, Inc., on March 25, 2002,
5 the costs incurred by the United States pursuant to Sections VII (Remedy Review), IX (Access
6 and Institutional Controls), XV (Emergency Response), and Paragraph 94 of Section XXI (Work
7 Takeover), or the costs incurred by the United States in enforcing the terms of this Consent
8 Decree, including all costs incurred in connection with Dispute Resolution pursuant to Section
9 XIX (Dispute Resolution) and all litigation costs.

10
11 "Future Response Costs" shall mean all costs, including, but not limited to, direct and
12 indirect costs, that the United States incurs in reviewing or developing plans, reports and other
13 items directly related to or associated with the Head of the Hylebos Site pursuant to this Consent
14 Decree, verifying the Work, or otherwise implementing, overseeing, or enforcing this Consent
15 Decree, including, but not limited to, payroll costs, contractor costs, travel costs, laboratory costs,
16 the costs incurred pursuant to Sections VII, IX (including, but not limited to, the cost of attorney
17 time and any monies paid to secure access and/or to secure or implement institutional controls
18 including, but not limited to, the amount of just compensation), XV, and Paragraph 94 of Section
19 XXI. Future Response Costs shall also include all costs incurred in overseeing implementation
20 of the Unilateral Administrative Order for Remedial Design and Remedial Action (EPA Docket
21 No. CERCLA. 10-2002-0065) that EPA has incurred since EPA issued this Unilateral
22 Administrative Order to the Settling Defendants on March 25, 2002, and shall include costs
23 incurred for bay-wide CB/NT Site work, but only if such costs are directly related to or are
24 attributed to the Head of the Hylebos Site. Future Response Costs shall not include costs
25 incurred that relate to or are associated with the Mouth/Middle of the Hylebos Problem Area,
26 including the costs incurred in overseeing implementation of Unilateral Administrative Order for

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1 Remedial Design and Remedial Action (EPA Docket No. CERCLA 10-2002-0064) that EPA
2 issued to the Port of Tacoma, Occidental Chemical Corporation and OCC Tacoma, Inc., on
3 March 25, 2002, the costs incurred in overseeing implementation of Unilateral Administrative
4 Order for Removal Activities (EPA Docket No. CERCLA 10-2002-0066) that EPA issued to the
5 Occidental Chemical Corporation and OCC Tacoma, Inc., on March 25, 2002, any costs
6 associated with any fish tissue studies, or costs incurred after Certification of the Remedial
7 Action pursuant to Paragraph 47.b of this Consent Decree that are incurred solely as a result of
8 any future release or threat of release of a hazardous substance, pollutant or contaminant at or in
9 the Head of the Hylebos Waterway Problem Area by any party other than the Settling
10 Defendants. The Settling Defendants shall have the burden of establishing that such costs are not
11 Future Response Costs.

12 “HCC AOC” shall mean the November 1993, Administrative Order on Consent for Pre-
13 Remedial Design Study, as amended, between EPA and six entities, including Settling
14 Defendants, Port of Tacoma and Occidental Chemical Corporation, EPA Docket No. 1093-07-
15 03-104/122.

16
17 “Head of the Hylebos Cleanup Account” shall mean the private account established by
18 the Settling Defendants for the purpose of receiving funds and paying for the Work.

19 “Head of Hylebos Waterway Disbursement Special Account” shall mean the EPA special
20 account established for the Site pursuant to Section 122(b)(3) of CERCLA, 42 U.S.C.
21 §9622(b)(3), and this Consent Decree.

22
23 “Head of the Hylebos Waterway Problem Area” or “Head of Hylebos Site” shall mean
24 Segments 1 and 2 as designated in the Pre-Remedial Design Report submitted under the HCC
25 AOC, as reflected in figures contained in the August 2000 ESD, excluding Sediment

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1 Management Areas 103 and 123. A map of the Head of the Hylebos Site is attached as
2 Appendix D to this Consent Decree.

3 “Hylebos Waterway Problem Area” shall mean the entire Hylebos Waterway, including
4 but not limited to the Mouth of Hylebos Waterway Problem Area, the Head of Hylebos
5 Waterway Problem Area, and all other areas of the Hylebos Waterway within Operable Unit 1 of
6 the CB/NT Site only extending from minus 60 foot depth line in the bay to the mouth of the
7 Hylebos Creek. The Hylebos Waterway is within the Commencement Bay Nearshore/Tideflats
8 Superfund Site, encompassing approximately 285 acres, in the northern-most Waterway in
9 Commencement Bay that is bordered by Taylor Way to the south and Marine View Drive to the
10 north in Tacoma, Pierce County, Washington and depicted generally on the map attached as
11 Appendix C.
12

13 “Hylebos Waterway Problem Area Escrow Account” shall mean the account created
14 pursuant to Appendix D of the Consent Decree in United States v. Mary Anderson et al., Civil
15 Action No. CO3-5107 (W.D. WA 2003)

16 “Hylebos Waterway Special Account” shall mean the special account established at the
17 Site by EPA pursuant to Section 122(b)(3) of CERCLA, 42 U.S.C. §9622(b)(3), and created by
18 the Consent Decree entered in U.S.v. Bay Chemical Company, et. al., C99-6621(RJB)(W.D. WA
19 June 23, 2000).
20

21 “Interest,” shall mean interest at the rate specified for interest on investments of the EPA
22 Hazardous Substance Superfund established by 26 U.S.C. § 9507, compounded annually on
23 October 1 of each year, in accordance with 42 U.S.C. § 9607(a). The applicable rate of interest
24 shall be the rate in effect at the time the interest accrues. The rate of interest is subject to change
25 on October 1 of each year.
26

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1 “Interest Earned” shall mean interest earned on amounts in the Hylebos Waterway
2 Problem Areas Special Account, or the Head of the Hylebos Waterway Disbursement Special
3 Account, which shall be computed monthly at a rate based on the annual return on investments of
4 the Hazardous Substance Superfund. The applicable rate of interest shall be the rate in effect at
5 the time the interest accrues.

6 “Mouth of the Hylebos Cleanup Account” shall mean the account established by the Port
7 of Tacoma and Occidental Chemical Corporation for the purpose of receiving funds and paying
8 for the work associated with the Mouth of the Hylebos Site.

9
10 “Mouth of the Hylebos Waterway Problem Area” or “Mouth of the Hylebos Site” shall
11 mean segments 3, 4, and 5, as designated in the Pre-Remedial Design Report submitted under the
12 HCC AOC, as reflected in figures contained in the August 2000 ESD. The Mouth of the Hylebos
13 Site shall also include portions of Segment 1 designated as Sediment Management Areas 103 and
14 123 in such Pre-Remedial Design Report and the August 2000 ESD. The Mouth of the Hylebos
15 Site shall also include Blair Slip 1, which is the disposal site for contaminated marine sediment
16 from the Mouth of the Hylebos Site as well as other locations.

17 “Mouth of Hylebos Defendants” shall mean the Port of Tacoma and Occidental Chemical
18 Corporation which are performing remedial design and remedial action in the Mouth of Hylebos
19 Waterway Problem Area pursuant to a separate consent decree and/or unilateral administrative
20 order.

21
22 “National Contingency Plan” or “NCP” shall mean the National Oil and Hazardous
23 Substances Pollution Contingency Plan promulgated pursuant to Section 105 of CERCLA, 42
24 U.S.C. § 9605, codified at 40 C.F.R. Part 300, and any amendments thereto.

1 “Operation, Maintenance & Monitoring” or “O, M & M” shall mean all activities
2 required to maintain the effectiveness of the Remedial Action as required under the Operation,
3 Maintenance and Monitoring Plan approved or developed by EPA pursuant to this Consent
4 Decree and the SOW.

5 “Paragraph” shall mean a portion of this Consent Decree identified by an arabic numeral
6 or an upper case letter.

7
8 “Parties” shall mean the United States and the Settling Defendants.

9
10 “Performance Standards” shall mean the cleanup standards, standards of control, and
11 other substantive requirements, criteria or limitations, including Sediment Quality Objectives,
12 construction and post-construction standards, and habitat standards, set forth in the ROD, the
13 1997 ESD, the August 2000 ESD, and the SOW, and approved plans, deliverables, or reports
14 required by the SOW.

15 “Plaintiff” shall mean the United States.

16 “RCRA” shall mean the Solid Waste Disposal Act, as amended, 42 U.S.C. §§ 6901 et
17 seq. (also known as the Resource Conservation and Recovery Act).

18
19 “Record of Decision” or “ROD” shall mean the EPA Record of Decision relating to the
20 CB/NT Site signed on September 30, 1989, by the Regional Administrator, EPA Region 10, all
21 attachments thereto and incorporating all significant differences thereto documented in the ESD
22 issued on July 28, 1997 and the ESD issued on August 3, 2000. The ROD and the 1997 and
23 2000 ESDs are attached as Appendix A. The 1997 ESD or the 2000 ESD may be referred to or
24 discussed individually or separately from the 1989 ROD in this Consent Decree where
25 appropriate.

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1 “Remedial Action” shall mean those activities, except for Operation, Maintenance, and
2 Monitoring to be undertaken by the Settling Defendants to implement the ROD, in accordance
3 with the SOW and other plans, deliverables, or reports approved by EPA and required by the
4 SOW.

5 “Remedial Action Work Plan” shall mean the document developed pursuant to this
6 Consent Decree and SOW and approved by EPA, and any amendments thereto.
7

8 “Remedial Design” shall mean those activities to be undertaken by the Settling
9 Defendants to develop the final plans and specifications for the Remedial Action developed in
10 accordance with the SOW.

11 “Remedial Design Work Plan” shall mean the document developed pursuant to this
12 Consent Decree and SOW and approved by EPA, and any amendments thereto.
13

14 “Section” shall mean a portion of this Consent Decree identified by a roman numeral.

15 “Settling Defendants” shall mean ATOFINA Chemicals, Inc. and General Metals of
16 Tacoma, Inc., currently doing business as Schnitzer Steel of Tacoma and Schnitzer Steel
17 Industries, Inc., its owner.
18

19 “State” shall mean the State of Washington.

20 “Statement of Work” or “SOW” shall mean the statement of work for implementation of
21 the Remedial Design, Remedial Action, and Operation, Maintenance and Monitoring at the Head
22 of the Hylebos Site, as set forth in Appendix B to this Consent Decree and any modifications
23 made in accordance with this Consent Decree. SOW shall include all work plans, schedules, and
24 other tasks described and required in the SOW to be approved by EPA.
25

1 "Supervising Contractor" shall mean the principal contractor retained by the Settling
2 Defendants to supervise and direct the implementation of the Work under this Consent Decree.

3 "UAO" shall mean the Unilateral Administrative Order for Remedial Design and
4 Remedial Action (EPA Docket No. CERCLA. 10-2002-0065) that EPA issued to the Settling
5 Defendants on March 25, 2002.

6
7 "United States" shall mean the United States of America, including all of its departments,
8 agencies, and instrumentalities, which includes without limitation EPA and any federal natural
9 resources trustee.

10 "Waste Material" shall mean (1) any "hazardous substance" under Section 101(14) of
11 CERCLA, 42 U.S.C. § 9601(14); (2) any pollutant or contaminant under Section 101(33), 42
12 U.S.C. § 9601(33); (3) any "solid waste" under Section 1004(27) of RCRA, 42 U.S.C.
13 § 6903(27); and (4) any "hazardous material" under the Washington's Model Toxics Control
14 Act, Washington RCW 70.105D.

15
16 "Work" shall mean all activities Settling Defendants are required to perform under this
17 Consent Decree, and in the SOW, except those required by Section XXV (Retention of Records).

18
19 V. GENERAL PROVISIONS

20 5. Objectives of the Parties. The objectives of the Parties in entering into this
21 Consent Decree are to protect public health, welfare and the environment at the Hylebos
22 Waterway Problem Area by the design and implementation of response actions at the Head of
23 the Hylebos Site by the Settling Defendants, to reimburse response costs of the Plaintiff, to
24 resolve the claims of the Plaintiff which have been asserted against Settling Defendants, and to
25 resolve the claims of Settling Defendants which have been or could have been asserted against

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1 the United States with regard to the Hylebos Waterway Problem Area and to provide Settling
2 Defendants with protection from contribution actions or claims asserted against Settling
3 Defendants as provided in this Consent Decree.

4
5 6. Commitments by Settling Defendants

6 a. Settling Defendants shall finance and perform the Work in accordance
7 with this Consent Decree, the ROD, the Head of Hylebos SOW, and all work plans and other
8 plans, standards, specifications, and schedules set forth herein or developed by Settling
9 Defendants and approved by EPA pursuant to this Consent Decree. Settling Defendants shall
10 also reimburse the United States for Future Response Costs as provided in this Consent Decree.
11 This Consent Decree supercedes the UAO and all activities previously required by the UAO,
12 including reimbursement of response costs, are incorporated into and enforceable under this
13 Consent Decree. The UAO shall be withdrawn and be of no further force and effect upon entry
14 of this Consent Decree.

15 b. The obligations of Settling Defendants to finance and perform the Work
16 and to pay amounts owed the United States under this Consent Decree are joint and several. In
17 the event of the insolvency or other failure of one of the Settling Defendants to implement the
18 requirements of this Consent Decree, the remaining Settling Defendants shall complete all such
19 requirements.
20

21 7. Compliance With Applicable Law. All activities undertaken by Settling
22 Defendants pursuant to this Consent Decree shall be performed in accordance with the
23 requirements of all applicable federal and state laws and regulations. Settling Defendants must
24 also comply with all applicable or relevant and appropriate requirements of all Federal and state
25
26

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1 environmental laws as set forth in the ROD and the SOW. The activities conducted pursuant to
2 this Consent Decree, if approved by EPA, are consistent with the NCP.

3 8. Permits
4

5 a. As provided in Section 121(e) of CERCLA and Section 300.400(e) of the
6 NCP, no permit shall be required for any portion of the Work conducted entirely on-site (i.e.,
7 within the areal extent of contamination within the CB/NT Site or in very close proximity to the
8 contamination and necessary for implementation of the Work). Where any portion of the Work
9 that is not on-site requires a federal or state permit or approval, Settling Defendants shall submit
10 timely and complete applications and take all other actions necessary to obtain all such permits or
11 approvals.

12 b. The Settling Defendants may seek relief under the provisions of Section
13 XVIII (Force Majeure) of this Consent Decree for any delay in the performance of the Work
14 resulting from a failure to obtain, or a delay in obtaining, any permit required for the Work.
15

16 c. This Consent Decree is not, and shall not be construed to be, a permit
17 issued pursuant to any federal or state statute or regulation.

18 9. Notice to Successors-in-Title.
19

20 a. With respect to any property owned or controlled by the Settling
21 Defendants that is located within the Hylebos Waterway Problem Area, within 15 days after the
22 entry of this Consent Decree, the Settling Defendants shall submit to EPA for review and
23 approval a notice to be filed with the Recorder's Office or Registry of Deeds or other appropriate
24 office, Pierce County, State of Washington, which shall provide notice to all successors-in-title
25 that the property is part of the Hylebos Waterway Problem Area, that EPA selected a remedy for
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1 the CB/NT Site on September 30, 1989, and that potentially responsible parties have entered into
2 a Consent Decree requiring implementation of the remedy in the Hylebos Waterway Problem
3 Area. Such notices shall identify the United States District Court in which the Consent Decree
4 was filed, the name and civil action number of this case, and the date the Consent Decree was
5 entered by the Court. The Settling Defendants shall record the notices within ten (10) days of
6 EPA's approval of the notices. The Settling Defendants shall provide EPA with a certified copy
7 of the recorded notices within 10 days of recording such notices.

8
9 b. At least thirty (30) days prior to the conveyance of any interest in property
10 located within the Hylebos Waterway Problem Area including, but not limited to, fee interests,
11 and leasehold interests, the Settling Defendants conveying the interest shall give the grantee
12 written notice of (i) this Consent Decree, and (ii) any recorded restrictive covenant authorized by
13 Wash. RCW 70.105D.030(1)(f) and (g), and more specifically described in Washington
14 Administrative Code (WAC) 173-340-440 that places use restrictions on and concerning the real
15 property as more fully described in Section IX of this Consent Decree. At least thirty (30) days
16 prior to such conveyance, the Settling Defendants conveying the interest shall also give written
17 notice to EPA and the State of the proposed conveyance, including the name and address of the
18 grantee, and the date on which notice of the Consent Decree, access easements, and/or restrictive
19 easements or covenants was given to the grantee.

20 c. In the event of any such conveyance, the Settling Defendants' obligations
21 under this Consent Decree, including, but not limited to, its obligation to perform the Work
22 under Section VI of this Consent Decree and the SOW, provide or secure access and institutional
23 controls, as well as to abide by such institutional controls, pursuant to Section IX (Access and
24 Institutional Controls) of this Consent Decree, shall continue to be met by the Settling
25 Defendant(s). In no event shall the conveyance release or otherwise affect the liability of the
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1 Settling Defendants to comply with all provisions of this Consent Decree, absent the prior
2 written consent of EPA. If the United States approves, the grantee may perform some or all of
3 the Work under this Consent Decree.

4
5 d. The notice obligations under this section shall terminate upon certification
6 of completion of the Work, in accordance with Section XIV (Certification of Completion) of the
7 Consent Decree, except to the extent that the property is subject to ongoing institutional controls
8 pursuant to Section IX (Access and Institutional Controls) of this Consent Decree.

9 VI. PERFORMANCE OF THE WORK BY SETTLING DEFENDANTS

10 10. Selection of Supervising Contractor.

11
12 a. All aspects of the Work to be performed by Settling Defendants pursuant
13 to Sections VI (Performance of the Work by Settling Defendants), VII (Remedy Review), VIII
14 (Quality Assurance, Sampling and Data Analysis), and XV (Emergency Response) of this
15 Consent Decree shall be under the direction and supervision of the Supervising Contractor, Paul
16 Fuglevand, who has been approved by EPA. If at any time, Settling Defendants propose to
17 change its Supervising Contractor, Settling Defendants shall notify EPA in writing of the name,
18 title, and qualifications of any contractor proposed to be the Supervising Contractor and must
19 obtain an authorization to proceed from EPA before the new Supervising Contractor performs,
20 directs, or supervises any Work under this Consent Decree. The selection of a new Supervising
21 Contractor shall be subject to disapproval by EPA. An EPA decision to disapprove a
22 Supervising Contractor shall be subject to the dispute resolution proceedings of Paragraph 74
23 (record review) of this Consent Decree. With respect to any contractor proposed to be
24 Supervising Contractor, Settling Defendants shall demonstrate that the contractor has a quality
25 system that complies with ANSI/ASQC E4-1994, "Specifications and Guidelines for Quality
26

1 Systems for Environmental Data Collection and Environmental Technology Programs,”
2 (American National Standard, January 5, 1995), by submitting a copy of the proposed
3 contractor’s Quality Management Plan (QMP). The QMP should be prepared in accordance with
4 “EPA Requirements for Quality Management Plans (QA/R-2)” (EPA/240/B-01/002, March
5 2001) or equivalent documentation as determined by EPA. The approved Supervising Contractor
6 mentioned above, has made the required demonstration.

7
8 b. If EPA disapproves a proposed Supervising Contractor, EPA will notify
9 Settling Defendants in writing. Settling Defendants shall submit to EPA a list of additional
10 contractors, including the qualifications of each contractor, that would be acceptable to them
11 within 30 days of receipt of EPA's disapproval of the contractor previously proposed. EPA will
12 provide written notice of the names of any contractor(s) that it disapproves and an authorization
13 to proceed with respect to any of the other contractors. Settling Defendants may select any
14 contractor from that list that is not disapproved and shall notify EPA of the name of the
15 contractor selected within 21 days of EPA's authorization to proceed.

16 c. If EPA fails to provide written notice of its authorization to proceed or
17 disapproval as provided in this Paragraph and if this failure prevents the Settling Defendants
18 from meeting one or more deadlines in a plan approved by the EPA pursuant to this Consent
19 Decree, Settling Defendants may seek relief under the provisions of Section XVIII (Force
20 Majeure).

21 11. Remedial Design and Remedial Action.
22

23 a. Settling Defendants shall perform the Remedial Design and Remedial
24 Action activities as described in the SOW and in accordance with the schedule set forth in the
25 SOW. The SOW is attached to this Consent Decree as Appendix B and by this reference is
26

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1 incorporated into this Consent Decree, and the SOW and all of its provisions, requirements,
2 tasks, schedule, and deliverables (work plans, reports, and other documents) shall be submitted to
3 EPA for review and approval pursuant to Section XI (EPA Approval of Plans and Other
4 Submissions) and once approved by EPA shall be enforceable under the terms of this Consent
5 Decree.

6
7 b. The Settling Defendants shall continue to implement Remedial Action
8 until certification of completion of Remedial Action in accordance with Section XIV
9 (Certification of Completion) of this Consent Decree. The Settling Defendants shall continue to
10 implement the Work until certification of completion of the Work in accordance with Section
11 XIV (Certification of Completion) of this Consent Decree.

12 12. Modification of the SOW or Related Work Plans.

13
14 a. If EPA determines that modification to the work specified in the Head of
15 the Hylebos SOW and/or in work plans developed pursuant to the SOW is necessary to achieve
16 and maintain the Performance Standards or to carry out and maintain the effectiveness of the
17 remedy set forth in the ROD, EPA may require that such modification be incorporated in the
18 Head of the Hylebos SOW and/or such work plans. Provided, however, that a modification may
19 only be required pursuant to this Paragraph to the extent that it is consistent with the scope of the
20 remedy selected in the ROD.

21 b. For the purposes of Paragraphs 12, 47.b., and 48 only, the "scope of the
22 remedy selected in the ROD" shall mean the following:

23 1. remediation of contaminated marine sediment in the Head of the
24 Hylebos Waterway Problem Area by implementing and maintaining the following key
25 elements of the selected remedy: site use restrictions, natural recovery, enhanced natural
26

1 recovery, sediment remedial action, and monitoring. These key elements are more fully
2 described in Section 10 of the September 30, 1989 ROD and the SOW and include
3 achieving Performance Standards as defined in this Consent Decree.

4 c. If Settling Defendants object to any modification determined by EPA to be
5 necessary pursuant to this Paragraph, they may seek dispute resolution pursuant to Section XIX
6 (Dispute Resolution), Paragraph 74 (record review). The Head of the Hylebos SOW and/or
7 related work plans shall be modified in accordance with final resolution of the dispute.
8

9 d. Settling Defendants shall implement any work required by any
10 modifications incorporated in the Head of the Hylebos SOW and/or in work plans developed
11 pursuant to the SOW in accordance with this Paragraph.

12 e. Nothing in this Paragraph shall be construed to limit EPA's authority to
13 require performance of further response actions as otherwise provided in this Consent Decree.
14

15 13. Settling Defendants acknowledge and agree that nothing in this Consent Decree,
16 or the SOW and/or related work plans, including the Remedial Design Work Plan, the Remedial
17 Action Work Plan and the Operations, Maintenance and Monitoring Plan, constitutes a warranty
18 or representation of any kind by Plaintiff that compliance with the work requirements set forth in
19 the SOW and/or related work plans, including the Remedial Design Work Plan, the Remedial
20 Action Work Plan and the Operations, Maintenance and Monitoring Plan, will achieve the
21 Performance Standards.

22 14. a. Settling Defendants shall, prior to any off-Site shipment of Waste Material
23 from the Head of the Hylebos Site to an out-of-state waste management facility, provide written
24 notification to the appropriate state environmental official in the receiving facility's state and to
25 the EPA Project Coordinator, identified in Section XII of this Consent Decree, of such shipment
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1 of Waste Material. However, this notification requirement shall not apply to any off-Site
2 shipments when the total volume of all such shipments will not exceed 10 cubic yards.

3 (1) The Settling Defendants shall include in the written notification the
4 following information, where available: (1) the name and location of the facility to which the
5 Waste Material are to be shipped; (2) the type and quantity of the Waste Material to be shipped;
6 (3) the expected schedule for the shipment of the Waste Material; and (4) the method of
7 transportation. The Settling Defendants shall notify the state in which the planned receiving
8 facility is located of major changes in the shipment plan, such as a decision to ship the Waste
9 Material to another facility within the same state, or to a facility in another state.

10
11 (2) The identity of the receiving facility and state will be determined
12 by the Settling Defendants following the award of the contract for Remedial Action construction.
13 The Settling Defendants shall provide the information required by Paragraph 14.a. as soon as
14 practicable after the award of the contract and before the Waste Material is actually shipped.

15 b. Before shipping any hazardous substances, pollutants, or
16 contaminants from the CB/NT Site to an off-site location, Settling Defendants shall obtain EPA's
17 certification that the proposed receiving facility is operating in compliance with the requirements
18 of CERCLA Section 121(d)(3) and 40 C.F.R. 300.440. Settling Defendants shall only send
19 hazardous substances, pollutants, or contaminants from the CB/NT Site to an off-site facility that
20 complies with the requirements of the statutory provision and regulations cited in the preceding
21 sentence.

VII. REMEDY REVIEW

15. Periodic Review. Settling Defendants shall conduct any studies and investigations concerning and related to the Head of the Hylebos Waterway Problem Area as requested by EPA, in order to permit EPA to conduct reviews of whether the Remedial Action at the Hylebos Waterway Problem Area is protective of human health and the environment at least every five years as required by Section 121(c) of CERCLA and any applicable regulations.

16. EPA Selection of Further Response Actions. If EPA determines, at any time, that the Remedial Action at the Hylebos Waterway Problem Area is not protective of human health and the environment, EPA may select further response actions for the Hylebos Waterway Problem Area in accordance with the requirements of CERCLA and the NCP.

17. Opportunity To Comment. Settling Defendants and, if required by Sections 113(k)(2) or 117 of CERCLA, the public, will be provided with an opportunity to comment on any further response actions proposed by EPA as a result of the review conducted pursuant to Section 121(c) of CERCLA and to submit written comments for the record during the comment period.

18. Settling Defendants' Obligation To Perform Further Response Actions. If EPA selects further response actions for the Head of the Hylebos Site pursuant to Paragraph 16, the Settling Defendants shall undertake such further response actions to the extent that the reopener conditions in Paragraph 90 or Paragraph 91 (United States' reservations of liability based on unknown conditions or new information) are satisfied. Settling Defendants may invoke the procedures set forth in Section XIX (Dispute Resolution) to dispute (1) EPA's determination that the reopener conditions of Paragraph 90 or Paragraph 91 of Section XXI (Covenants Not To Sue by Plaintiff) are satisfied, (2) EPA's determination that the Remedial Action for the Head of the

1 Hylebos Site is not protective of human health and the environment, or (3) EPA's selection of the
2 further response actions in the Head of the Hylebos Site. Disputes pertaining to the whether the
3 Remedial Action is protective or to EPA's selection of further response actions shall be resolved
4 pursuant to Paragraph 74 (record review). Settling Defendants' obligations to perform further
5 response actions under this Paragraph do not pertain to releases or the potential threat of a release
6 of a hazardous substance, pollutant or contaminant that occurs after certification of completion of
7 the Remedial Action as described in Paragraph 47.b. if such release or threat of release is solely
8 caused by a party or parties other than the Settling Defendants and the Settling Defendants are
9 not otherwise potentially liable under CERCLA Section 107 for such release or potential threat
10 of a release of a hazardous substance.

11 19. Submissions of Plans. If Settling Defendants are required to perform the further
12 response actions pursuant to Paragraph 18, they shall submit a plan for such work to EPA for
13 approval in accordance with the procedures set forth in Section VI (Performance of the Work by
14 Settling Defendants) and shall implement the plan approved by EPA in accordance with the
15 provisions of this Decree.
16

17 VIII. QUALITY ASSURANCE, SAMPLING, AND DATA ANALYSIS

18 20. Settling Defendants shall use quality assurance, quality control, and chain of
19 custody procedures for all samples taken under the SOW and this Consent Decree in accordance
20 with "EPA Requirements for Quality Assurance Project Plans (QA/R5)" (EPA/240/B-01/003,
21 March 2001) "Guidance for Quality Assurance Project Plans (QA/G-5)" (EPA/600/R-98/018,
22 February 1998), and subsequent amendments to such guidelines upon notification by EPA to
23 Settling Defendants of such amendment. Amended guidelines shall apply only to procedures
24 conducted after such notification. Prior to the commencement of any monitoring project under
25 this Consent Decree, Settling Defendants shall submit to EPA for approval, after a reasonable
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1 opportunity for review and comment by the State, a Quality Assurance Project Plan ("QAPP")
2 that is consistent with the SOW, the NCP and applicable guidance documents. If relevant to the
3 proceeding, the Parties agree that validated sampling data generated in accordance with the
4 QAPP(s) and reviewed and approved by EPA shall be admissible as evidence, without objection,
5 in any proceeding under this Decree. Settling Defendants shall ensure that EPA and State
6 personnel and their authorized representatives are allowed access at reasonable times to all
7 laboratories utilized by Settling Defendants in implementing this Consent Decree. In addition,
8 Settling Defendants shall ensure that such laboratories shall analyze all samples submitted by
9 EPA pursuant to the QAPP for quality assurance monitoring. Settling Defendants shall ensure
10 that the laboratories they utilize for the analysis of samples taken pursuant to this Consent Decree
11 perform all analyses according to accepted EPA methods. Accepted EPA methods consist of
12 those methods which are documented in the "Contract Lab Program Statement of Work for
13 Inorganic Analysis" and the "Contract Lab Program Statement of Work for Organic Analysis,"
14 dated February 1988, and any amendments made thereto during the course of the implementation
15 of this Decree; however, upon approval by EPA, the Settling Defendants may use other analytical
16 methods which are as stringent as or more stringent than the CLP-approved methods. Settling
17 Defendants shall ensure that all laboratories they use for analysis of samples taken pursuant to
18 this Consent Decree participate in an EPA or EPA-equivalent QA/QC program. Settling
19 Defendants shall only use laboratories that have a documented Quality System which complies
20 with ANSI/ASQC E4-1994, "Specifications and Guidelines for Quality Systems for
21 Environmental Data Collection and Environmental Technology Programs," (American National
22 Standard, January 5, 1995), and "EPA Requirements for Quality Management Plans (QA/R-2),"
23 (EPA/240/B-01/002, March 2001) or equivalent documentation as determined by EPA. EPA
24 may consider laboratories accredited under the National Environmental Laboratory Accreditation
25 Program (NELAP) as meeting the Quality System requirements. Settling Defendants shall
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ensure that all field methodologies utilized in collecting samples for subsequent analysis pursuant to this Decree will be conducted in accordance with the procedures set forth in the QAPP approved by EPA.

21. Upon request, the Settling Defendants shall allow split or duplicate samples to be taken by EPA or its authorized representatives. Settling Defendants shall notify EPA not less than fourteen (14) days in advance of any sample collection activity unless shorter notice is agreed to by EPA. In addition, EPA shall have the right to take any additional samples that EPA deems necessary. Upon request, EPA shall allow the Settling Defendants to take split or duplicate samples of any samples it takes as part of the Plaintiff's oversight of the Settling Defendants' implementation of the Work.

22. Settling Defendants shall submit to EPA four (4) copies of the results of all sampling and/or tests or other data obtained or generated by or on behalf of Settling Defendants with respect to the Site and/or the implementation of this Consent Decree unless EPA agrees otherwise.

23. Notwithstanding any provision of this Consent Decree, the United States hereby retains all of its information gathering and inspection authorities and rights, including enforcement actions related thereto, under CERCLA, RCRA and any other applicable statutes or regulations.

IX. ACCESS AND INSTITUTIONAL CONTROLS

24. If the Hylebos Waterway Problem Area, or any other property where access and/or land/water use restrictions are needed to implement this Consent Decree or other response actions being taken under another Consent Decree or Order by EPA, is owned or controlled by any of the Settling Defendants, such Settling Defendants shall:

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1 a. commencing on the date of lodging of this Consent Decree, provide the
2 United States and the State and their representatives, including EPA and its contractors, and any
3 other parties and their contractors performing response actions within the CB/NT Site with
4 access at all reasonable times to the property within the Hylebos Waterway Problem Area owned
5 or controlled by Settling Defendants, or such other property, for the purpose of conducting any
6 activity related to this Consent Decree or other response actions being taken under another
7 Consent Decree or Order by EPA in the Hylebos Waterway Problem Area including, but not
8 limited to, the following activities:

- 9 1. Monitoring the Work under this Consent Decree and other
10 response actions being taken under any other Consent Decree or Order;
- 11 2. Verifying any data or information submitted to the United States or
12 the State;
- 13 3. Conducting investigations relating to contamination at or near the
14 Hylebos Waterway Problem Area;
- 15 4. Obtaining samples;
- 16 5. Assessing the need for, planning, or implementing additional
17 response actions at or near the Hylebos Waterway Problem Area;
- 18 6. Implementing the Work pursuant to the conditions set forth in
19 Paragraph 94 of this Consent Decree and remedial action work at the Mouth of the
20 Hylebos Waterway Problem Area;

1 7. Inspecting and copying records, operating logs, contracts, or other
2 documents related to the Work maintained or generated by Settling Defendants or their
3 agents, consistent with Section XXIV (Access to Information);

4 8. Assessing Settling Defendants' compliance with this Consent
5 Decree;

6
7 9. Determining whether the Hylebos Waterway Problem Area or
8 other property is being used in a manner that is prohibited or restricted, or that may need
9 to be prohibited or restricted, by or pursuant to this Consent Decree or another Consent
10 Decree or order by EPA; and

11 10. Assessing implementation of quality assurance and quality control
12 practices as defined in the approved Quality Assurance Project Plans.

13
14 b. commencing on the date of lodging of this Consent Decree, refrain from
15 using such property owned or controlled by Settling Defendants, in any manner that would
16 interfere with or adversely affect the implementation, integrity or protectiveness of the remedial
17 measures to be implemented pursuant to this Consent Decree or another Consent Decree or order
18 by EPA in the Hylebos Waterway Problem Area so as to achieve the following institutional
19 control objectives:

20 1. reduce potential exposure of marine organisms to contaminated
21 sediments disposed of and confined in aquatic disposal sites or confined by capping;
22 and/or

23
24 2. reduce potential exposure to marine organisms to contaminated
25 sediments left in place in the Hylebos Waterway.

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1 c. at EPA's request, execute and record in the Auditor's Office or Registry of
2 Deeds or other appropriate land records office of Pierce County, State of Washington, an
3 easement and/or restrictive covenant authorized by the Washington Model Toxics Control Act
4 (MTCA) (MTCA Easement) and that complies with the form and content contained in WAC
5 173-340-440 for provision of access for the purpose of conducting any activity related to this
6 Consent Decree or another Consent Decree or Order by EPA relating to the Hylebos Waterway
7 Problem Area and for implementation of institutional controls that are required to assure
8 continued protection of human health and the environment or the integrity of the remedial action
9 by meeting the institutional control objectives identified in Paragraph 24.b, or another Consent
10 Decree or Order by EPA relating to the Hylebos Waterway Problem Area including, but not
11 limited to, those listed in Paragraphs 24.a and 24.b of this Consent Decree. Within thirty (30)
12 days of EPA's request, Settling Defendants shall submit a draft MTCA Easement to EPA for
13 approval. Settling Defendants shall execute and record the EPA approve MTCA Easement
14 within ten (10) days of its approval.

15 25. If the Head of the Hylebos Site, or any other property where access and/or
16 land/water use restrictions are needed to implement this Consent Decree, is owned or controlled
17 by persons other than any of the Settling Defendants, Settling Defendants shall use best efforts to
18 secure from such persons:

19 a. an agreement to provide access thereto for Settling Defendants, as well as
20 for the United States on behalf of EPA, and the State, as well as their representatives (including
21 contractors), for the purpose of conducting any activity related to this Consent Decree including,
22 but not limited to, those activities listed in Paragraphs 9 and 24.a. of this Consent Decree;

23 b. an agreement, enforceable by the Settling Defendants and the United
24 States, from using the the Head of the Hylebos Site, or such other property, in any manner that
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1 would interfere with or adversely affect the implementation, integrity, or protectiveness of the
2 remedial measures to be performed pursuant to this Consent Decree and to abide by the
3 obligations and objectives established by Paragraph 24.b. of this Consent Decree; and

4 c. if EPA requests, a MTCA Easement for provision of access and
5 implementation of institutional controls that are required to assure continued protection of human
6 health and the environment or the integrity of the remedial action. Within thirty (30) days of
7 EPA's request, Settling Defendants shall submit a draft MTCA Easement to EPA for approval.
8 Settling Defendants shall execute and record the EPA approve MTCA Easement within ten (10)
9 days of its approval.
10

11 26. For purposes of Paragraph 25 of this Consent Decree, "best efforts" includes the
12 payment of reasonable sums of money in consideration of access and/or restrictive covenants,
13 unless the owner is a potentially responsible party for the Hylebos Waterway Problem Area. If
14 any access agreements required by Paragraphs 25.a. of this Consent Decree are not obtained
15 within forty-five (45) days of the date of entry of this Consent Decree, or any access easements
16 or restrictive covenants required by Paragraph 25.c. of this Consent Decree are not submitted to
17 EPA in draft form within forty-five (45) days from EPA's request, Settling Defendants shall
18 promptly notify the United States in writing, and shall include in that notification a summary of
19 the steps that Settling Defendants have taken to attempt to comply with Paragraph 25 of this
20 Consent Decree. The United States may, as it deems appropriate, assist Settling Defendants in
21 obtaining access or land/water use restrictions, either in the form of contractual agreements or in
22 the form of easements running with the land. Settling Defendants shall reimburse the United
23 States in accordance with the procedures in Section XVI (Reimbursement of Response Costs),
24 for all costs incurred, direct or indirect, by the United States in obtaining such access and/or
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1 land/water use restrictions including, but not limited to, the cost of attorney time and the amount
2 of monetary consideration paid or just compensation.

3
4 27. If EPA determines that land/water use restrictions in the form of state or local
5 laws, regulations, ordinances or other governmental controls are needed to implement the remedy
6 selected in the ROD, ensure the integrity and protectiveness thereof, or ensure non-interference
7 therewith, Settling Defendants shall cooperate with EPA's efforts to secure such governmental
8 controls by at a minimum: not contesting any proposed law, regulation, ordinance, or other
9 proposed governmental control; supplying data or any other information generated and/or
10 required by the SOW; or attending meetings in accordance with Section XXIV of this Consent
11 Decree.

12 28. Notwithstanding any provision of this Consent Decree, the United States retains
13 all of its access authorities and rights, as well as all of their rights to require land/water use
14 restrictions, including enforcement authorities related thereto, under CERCLA, RCRA, or the
15 MTCA, RCW 70.105D, and any other applicable statute or regulations.

16
17 X. REPORTING REQUIREMENTS

18 29. In addition to any other requirement of this Consent Decree, Settling Defendants
19 shall submit to EPA four (4) copies of written monthly progress reports that: (a) describe the
20 actions which have been taken toward achieving compliance with this Consent Decree during the
21 previous month; (b) include a summary of all results of sampling and tests and all other data
22 received or generated by Settling Defendants or their contractors or agents in the previous month;
23 (c) identify all work plans, plans and other deliverables required by this Consent Decree
24 completed and submitted during the previous month; (d) describe all actions, including, but not
25 limited to, data collection and implementation of work plans, which are scheduled for the next
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1 six weeks and provide other information relating to the progress of construction, including, but
2 not limited to, critical path diagrams, Gantt charts or Pert charts; (e) include information
3 regarding percentage of completion, unresolved delays encountered or anticipated that may affect
4 the future schedule for implementation of the Work, and a description of efforts made to mitigate
5 those delays or anticipated delays; (f) include any modifications to the work plans or other
6 schedules that Settling Defendants have proposed to EPA or that have been approved by EPA;
7 and (g) describe all activities undertaken in support of the Community Relations Plan during the
8 previous month and those to be undertaken in the next six weeks. Settling Defendants shall
9 submit these progress reports to EPA (and provide a copy to the State by the tenth day) of every
10 month following the lodging of this Consent Decree until EPA notifies the Settling Defendants
11 pursuant to Paragraph 48 of Section XIV (Certification of Completion) or until EPA approves a
12 different schedule. If requested by EPA, Settling Defendants shall also provide briefings for
13 EPA to discuss the progress of the Work.

14
15 30. The Settling Defendants shall notify EPA of any change in the schedule described
16 in the monthly progress report for the performance of any activity, including, but not limited to,
17 data collection and implementation of work plans, no later than seven days prior to the
18 performance of the activity.

19 31. Upon the occurrence of any event during performance of the Work that Settling
20 Defendants are required to report pursuant to Section 103 of CERCLA or Section 304 of the
21 Emergency Planning and Community Right-to-know Act (EPCRA), Settling Defendants shall
22 within twenty-four (24) hours of the onset of such event orally notify the EPA Project
23 Coordinator or the Alternate EPA Project Coordinator (in the event of the unavailability of the
24 EPA Project Coordinator), or, in the event that neither the EPA Project Coordinator or Alternate
25 EPA Project Coordinator is available, the Emergency Response Section, Region 10, United

1 States Environmental Protection Agency. These reporting requirements are in addition to the
2 reporting required by CERCLA Section 103 or EPCRA Section 304.

3
4 32. Within twenty (20) days of the onset of such an event, Settling Defendants shall
5 furnish to Plaintiff a written report, signed by the Settling Defendants' Project Coordinator,
6 setting forth the events which occurred and the measures taken, and to be taken, in response
7 thereto. Within thirty (30) days of the conclusion of such an event, Settling Defendants shall
8 submit a report setting forth all actions taken in response thereto.

9 33. Settling Defendants shall submit four (4) copies of all plans, reports, and data
10 required by the SOW or any other approved work plans to EPA in accordance with the schedules
11 set forth in such plans. Settling Defendants shall simultaneously submit one (1) copy of all such
12 plans, reports and data to the State and one (1) copy to NOAA on behalf of the Natural Resource
13 Trustees. Upon request by EPA, Settling Defendants shall submit in electronic form all portions
14 of any report or other deliverable Settling Defendants are required to submit pursuant to the
15 provisions of this Consent Decree.

16
17 34. All reports and other documents submitted by Settling Defendants to EPA (other
18 than the monthly progress reports referred to above) which purport to document Settling
19 Defendants' compliance with the terms of this Consent Decree shall be signed by an authorized
20 representative of the Settling Defendants, including the Supervising Contractor.

21 XI. EPA APPROVAL OF PLANS AND OTHER SUBMISSIONS

22
23 35. After review of any plan, report or other item which is required to be submitted
24 for approval pursuant to this Consent Decree, EPA shall: (a) approve, in whole or in part, the
25 submission; (b) approve the submission upon specified conditions; (c) modify the submission to
26 cure the deficiencies; (d) disapprove, in whole or in part, the submission, directing that the

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1 Settling Defendants modify the submission; or (e) any combination of the above. However, EPA
2 shall not modify a submission without first providing Settling Defendants at least one notice of
3 deficiency and an opportunity to cure within thirty (30) days, except where to do so would cause
4 serious disruption to the Work or where previous submission(s) have been disapproved due to
5 material defects and the deficiencies in the submission under consideration indicate a bad faith
6 lack of effort to submit an acceptable deliverable.

7
8 36. In the event of approval, approval upon conditions, or modification by EPA,
9 pursuant to Paragraph 35(a), (b), or (c), Settling Defendants shall proceed to take any action
10 required by the plan, report, or other item, as approved or modified by EPA subject only to their
11 right to invoke the Dispute Resolution procedures set forth in Section XIX (Dispute Resolution)
12 with respect to the modifications or conditions made by EPA. In the event that the Settling
13 Defendants fail to cure within thirty (30) days, and EPA modifies the submission to cure the
14 deficiencies pursuant to Paragraph 35(c) and the submission has a material defect, EPA retains its
15 right to seek stipulated penalties, as provided in Section XX (Stipulated Penalties).

16 37. Resubmission of Plans.

17
18 a. Upon receipt of a notice of disapproval pursuant to Paragraph 35(d),
19 Settling Defendants shall, within 30 days or such longer time as agreed to by EPA due to the
20 magnitude of the comments in such notice, correct the deficiencies and resubmit the plan, report,
21 or other item for approval. Any stipulated penalties applicable to the submission, as provided in
22 Section XX, shall accrue during the 30 day period or otherwise specified period but shall not be
23 payable unless the resubmission is disapproved or modified due to a material defect as provided
24 in Paragraph 38 and 39. No stipulated penalties applicable to the submission, as provided in
25 Section XX, shall accrue during the first 30-day correction period or other agreed upon correction
26 period.

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1 b. Notwithstanding the receipt of a notice of disapproval pursuant to
2 Paragraph 35(d), Settling Defendants shall proceed, at the direction of EPA, to take any action
3 required by any non-deficient portion of the submission. Implementation of any non-deficient
4 portion of a submission shall not relieve Settling Defendants of any liability for stipulated
5 penalties under Section XX (Stipulated Penalties) related to the deficiencies.

6
7 38. In the event that a resubmitted plan, report or other item, or portion thereof, is
8 disapproved by EPA, EPA may again require the Settling Defendants to correct the deficiencies,
9 in accordance with the preceding Paragraphs. EPA also retains the right to modify or develop the
10 plan, report or other item. Settling Defendants shall implement any such plan, report, or item as
11 modified or developed by EPA, subject only to their right to invoke the procedures set forth in
12 Section XIX (Dispute Resolution).

13 39. If upon resubmission, a plan, report, or item is disapproved or modified by EPA
14 due to a material defect, Settling Defendants shall be deemed to have failed to submit such plan,
15 report, or item timely and adequately unless the Settling Defendants invoke the dispute resolution
16 procedures set forth in Section XIX (Dispute Resolution) and EPA's action is overturned
17 pursuant to that Section. The provisions of Section XIX (Dispute Resolution) and Section XX
18 (Stipulated Penalties) shall govern the implementation of the Work and accrual and payment of
19 any stipulated penalties during Dispute Resolution. If EPA's disapproval or modification is
20 upheld, stipulated penalties shall accrue for such violation from the date of the on which the
21 original submission was originally required, as provided in Section XX.

22 40. All plans, reports, and other items required to be submitted to EPA under this
23 Consent Decree shall, upon approval or modification by EPA, be enforceable under this Consent
24 Decree. In the event EPA approves or modifies a portion of a plan, report, or other item required
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1 to be submitted to EPA under this Consent Decree, the approved or modified portion shall be
2 enforceable under this Consent Decree.

3 4 XII. PROJECT COORDINATORS

5 41. The Settling Defendants' designated Project Coordinator is Paul Fuglevand and
6 EPA's designated Project Coordinator is Peter Contreras. If a Project Coordinator or Alternate
7 Project Coordinator initially designated is changed, the identity of the successor will be given to
8 the other Parties at least five (5) working days before the changes occur, unless impracticable, but
9 in no event later than the actual day the change is made. Unless already reviewed and not
10 disapproved by EPA, within five (5) days of the Effective Date of this Consent Decree, the
11 Settling Defendants shall notify EPA of its proposed Project Coordinator who shall be subject to
12 disapproval by EPA and shall have the technical expertise sufficient to adequately oversee all
13 aspects of the Work. The Settling Defendants' Project Coordinator shall not be an attorney for
14 any of the Settling Defendants in this matter. He or she may assign other representatives,
15 including other contractors, to serve as a Head of the Hylebos Site representative for oversight of
16 performance of daily operations during remedial activities.

17 42. Plaintiff may designate other representatives, including, but not limited to, EPA
18 employees, and federal contractors and consultants, to observe and monitor the progress of any
19 activity undertaken pursuant to this Consent Decree. EPA's Project Coordinator and Alternate
20 Project Coordinator shall have the authority lawfully vested in a Remedial Project Manager
21 (RPM) and an On-Scene Coordinator (OSC) by the National Contingency Plan, 40 C.F.R. Part
22 300. In addition, EPA's Project Coordinator or Alternate Project Coordinator shall have
23 authority, consistent with the National Contingency Plan, to halt any Work required by this
24 Consent Decree and to take any necessary response action when s/he determines that conditions
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1 at the Site constitute an emergency situation or may present an immediate threat to public health
2 or welfare or the environment due to release or threatened release of Waste Material.

3
4 XIII. ASSURANCE OF ABILITY TO COMPLETE WORK

5 43. Within thirty (30) days of entry of this Consent Decree, Settling Defendants shall
6 together establish and maintain financial security in the amount of \$ 29.7 Million in one or more
7 of the following forms:

- 8 a. A surety bond guaranteeing performance of the Work;
9
10 b. One or more irrevocable letters of credit equalling the total estimated cost
11 of the Work;
12
13 c. A trust fund;
14
15 d. A guarantee to perform the Work by one or more parent corporations or
16 subsidiaries, or by one or more unrelated corporations that have a substantial business
17 relationship with at least one of the Settling Defendants; or
18
19 e. A demonstration that one or more of the Settling Defendants satisfy the
20 requirements of 40 C.F.R. Part 264.143(f).

21 44. If the Settling Defendants seek to demonstrate the ability to complete the Work
22 through a guarantee by a third party pursuant to Paragraph 43 of this Consent Decree, Settling
23 Defendants shall demonstrate that the guarantor satisfies the requirements of 40 C.F.R. Part
24 264.143(f). If Settling Defendants seek to demonstrate their ability to complete the Work by
25 means of the financial test or the corporate guarantee pursuant to Paragraph 43.d. or 43.e., they
26 shall resubmit sworn statements conveying the information required by 40 C.F.R. Part 264.143(f)

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1 annually, on the anniversary of the Effective Date. In the event that EPA determines at any time
2 that the financial assurances provided pursuant to this Section are inadequate, Settling
3 Defendants shall, within 30 days of receipt of notice of EPA's determination, obtain and present
4 to EPA for approval one of the other forms of financial assurance listed in Paragraph 43 of this
5 Consent Decree. Settling Defendants' inability to demonstrate financial ability to complete the
6 Work shall not excuse performance of any activities required under this Consent Decree.

7
8 45. If Settling Defendants can show that the estimated cost to complete the remaining
9 Work has diminished below the amount set forth in Paragraph 43 above after entry of this
10 Consent Decree, Settling Defendants may, on any anniversary date of entry of this Consent
11 Decree, or at any other time agreed to by the Parties, reduce the amount of the financial security
12 provided under this Section to the estimated cost of the remaining work to be performed.
13 Settling Defendants shall submit a proposal for such reduction to EPA, in accordance with the
14 requirements of this Section, and may reduce the amount of the security upon approval by EPA.
15 In the event of a dispute, Settling Defendants may reduce the amount of the security in
16 accordance with the final administrative or judicial decision resolving the dispute.

17 46. Settling Defendants may change the form of financial assurance provided under
18 this Section at any time, upon notice to and approval by EPA, provided that the new form of
19 assurance meets the requirements of this Section. In the event of a dispute, Settling Defendants
20 may change the form of the financial assurance only in accordance with the final administrative
21 or judicial decision resolving the dispute.

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XIV. CERTIFICATION OF COMPLETION

47. a. Completion of the Remedial Action Construction.

1. Within thirty (30) days after Settling Defendants conclude that the Remedial Action construction, including construction of any required mitigation, has been fully performed but before all the Performance Standards have been attained, Settling Defendants shall schedule and conduct a pre-certification inspection to be attended by Settling Defendants and EPA. If, after the pre-certification inspection(s), the Settling Defendants still believe that the Remedial Action construction has been fully performed, they shall submit a written Remedial Action Construction Report requesting certification to EPA for approval pursuant to Section XI (EPA Approval of Plans and Other Submissions) within thirty (30) days of the inspection. In the report, a registered professional engineer and the Settling Defendants' Project Coordinator shall state that the Remedial Action construction has been completed in full satisfaction of the requirements of this Consent Decree. The written report shall include as-built drawings signed and stamped by a professional engineer and other supporting documentation to demonstrate the CQAP was followed. The report shall contain the following statement, signed by a responsible corporate official of a Settling Defendant or the Settling Defendants' Project Coordinator:

To the best of my knowledge, after thorough investigation, I certify that the information contained in or accompanying this submission is true, accurate and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

If, after completion of the pre-certification construction inspection and receipt and review of the written report, EPA, after reasonable opportunity to review and comment by the State, determines that the Remedial Action construction or any portion thereof has not been completed in accordance with this Consent Decree, EPA will notify Settling Defendants in writing of the activities that must be undertaken by Settling Defendants pursuant to this Consent Decree to

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1 complete the Remedial Action. EPA will set forth in the notice a schedule for performance of
2 such activities consistent with the Consent Decree or require the Settling Defendants to submit a
3 schedule to EPA for approval pursuant to Section XI (EPA Approval of Plans and Other
4 Submissions). Settling Defendants shall perform all activities described in the notice in
5 accordance with the specifications and schedules established pursuant to this Paragraph, subject
6 to their right to invoke the dispute resolution procedures set forth in Section XIX (Dispute
7 Resolution).

8
9 2. If EPA concludes, based on the initial or any subsequent report
10 requesting Certification of Remedial Action Construction Completion and after a reasonable
11 opportunity for review and comment by the State, that the Remedial Action construction has
12 been performed in accordance with this Consent Decree, EPA will so certify in writing to
13 Settling Defendants. Certification of Completion of the Remedial Action construction shall not
14 affect Settling Defendants' obligations under this Consent Decree.

15 b. Completion of Remedial Action.

16
17 (1) Within thirty (30) days after Settling Defendants conclude that the
18 Remedial Action has been fully performed and all the Performance Standards have been attained,
19 Settling Defendants shall schedule and conduct a pre-certification inspection to be attended by
20 Settling Defendants and EPA. If, after the pre-certification inspection(s), the Settling Defendants
21 still believe that the Remedial Action has been fully performed and the Performance Standards
22 have been attained, they shall submit a written Remedial Action Completion Report requesting
23 certification to EPA for approval pursuant to Section XI (EPA Approval of Plans and Other
24 Submissions) within thirty (30) days of the inspection. In the report, a registered professional
25 engineer and the Settling Defendants' Project Coordinator shall state that the Remedial Action
26 has been completed in full satisfaction of the requirements of this Consent Decree. The written

1 report shall include as-built drawings signed and stamped by a professional engineer and other
2 supporting documentation to demonstrate the CQAP was followed. The report shall contain the
3 following statement, signed by a responsible corporate official of a Settling Defendant or the
4 Settling Defendants' Project Coordinator:

5
6 To the best of my knowledge, after thorough investigation, I certify that the
7 information contained in or accompanying this submission is true, accurate and
8 complete. I am aware that there are significant penalties for submitting false
9 information, including the possibility of fine and imprisonment for knowing
10 violations.

11 If, after completion of the pre-certification inspection and receipt and review of the written
12 report, EPA, after reasonable opportunity to review and comment by the State, determines that
13 the Remedial Action or any portion thereof has not been completed in accordance with this
14 Consent Decree or that the Performance Standards have not been achieved, EPA will notify
15 Settling Defendants in writing of the activities that must be undertaken by Settling Defendants
16 pursuant to this Consent Decree to complete the Remedial Action and achieve the Performance
17 Standards. Provided, however, that EPA may only require Settling Defendants to perform such
18 activities pursuant to this Paragraph to the extent that such activities are consistent with the
19 "scope of the remedy selected in the ROD," as that term is defined in Paragraph 12.b. EPA will
20 set forth in the notice a schedule for performance of such activities consistent with the Consent
21 Decree and the SOW or require the Settling Defendants to submit a schedule to EPA for approval
22 pursuant to Section XI (EPA Approval of Plans and Other Submissions). Settling Defendants
23 shall perform all activities described in the notice in accordance with the specifications and
24 schedules established pursuant to this Paragraph, subject to their right to invoke the dispute
25 resolution procedures set forth in Section XIX (Dispute Resolution).

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27 (2) If EPA concludes, based on the initial or any subsequent report
28 requesting Certification of Remedial Action Completion and after a reasonable opportunity for

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1 review and comment by the State, that the Remedial Action has been performed in accordance
2 with this Consent Decree and that the Performance Standards have been achieved, EPA will so
3 certify in writing to Settling Defendants. This certification shall constitute the Certification of
4 Completion of the Remedial Action for purposes of this Consent Decree, including, but not
5 limited to, Section XXI (Covenants Not to Sue by Plaintiff). Certification of Completion of the
6 Remedial Action shall not affect Settling Defendants' obligations under this Consent Decree.

7
8 48. Completion of the Work.

9 a. Within thirty (30) days after Settling Defendants conclude that all phases
10 of the Work described in consistent with the SOW and this Consent Decree, have been fully
11 performed, Settling Defendants shall schedule and conduct a pre-certification inspection to be
12 attended by Settling Defendants and EPA. If, after the pre-certification inspection, the Settling
13 Defendants still believe that the Work has been fully performed, Settling Defendants shall submit
14 a Consent Decree Work Completion Report. In the report, a registered professional engineer
15 shall state that the Work has been completed in full satisfaction of the requirements of this
16 Consent Decree. The report shall contain the following statement, signed by a responsible
17 corporate official of a Settling Defendant or the Settling Defendants' Project Coordinator:

18
19 To the best of my knowledge, after thorough investigation, I certify that the
20 information contained in or accompanying this submission is true, accurate and
21 complete. I am aware that there are significant penalties for submitting false
22 information, including the possibility of fine and imprisonment for knowing
23 violations.

24 If, after review of the written report, EPA, after reasonable opportunity to review and comment
25 by the State, determines that any portion of the Work has not been completed in accordance with
26 this Consent Decree, EPA will notify Settling Defendants in writing of the activities that must be
27 undertaken by Settling Defendants pursuant to this Consent Decree to complete the Work.
28 Provided, however, that EPA may only require Settling Defendants to perform such activities

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pursuant to this Paragraph to the extent that such activities are consistent with the "scope of the remedy selected in the ROD," as that term is defined in Paragraph 12.b. EPA will set forth in the notice a schedule for performance of such activities consistent with the Consent Decree and the SOW or require the Settling Defendants to submit a schedule to EPA for approval pursuant to Section XI (EPA Approval of Plans and Other Submissions). Settling Defendants shall perform all activities described in the notice in accordance with the specifications and schedules established therein, subject to their right to invoke the dispute resolution procedures set forth in Section XIX (Dispute Resolution).

b. If EPA concludes, based on the initial or any subsequent request for Certification of Completion by Settling Defendants and after a reasonable opportunity for review and comment by the State, that the Work has been performed in accordance with this Consent Decree, EPA will so notify the Settling Defendants in writing.

XV. EMERGENCY RESPONSE

49. In the event of any action or occurrence during the performance of the Work which causes or threatens a release of Waste Material from the Head of the Hylebos Site that constitutes an emergency situation or may present an immediate threat to public health or welfare or the environment, Settling Defendants shall, subject to Paragraph 50, immediately take all appropriate action to prevent, abate, or minimize such release or threat of release, and shall immediately notify the EPA's Project Coordinator, or, if the Project Coordinator is unavailable, EPA's Alternate Project Coordinator. If neither of these persons is available, the Settling Defendants shall notify the EPA Emergency Response Unit, Region 10 at (206) 553-1263. Settling Defendants shall take such actions in consultation with EPA's Project Coordinator or other available authorized EPA officer and in accordance with all applicable provisions of the Health and Safety Plans, the Contingency Plans, and any other applicable plans or documents

1 developed pursuant to the SOW. In the event that Settling Defendants fail to take appropriate
2 response action as required by this Section, and EPA takes such action instead, Settling
3 Defendants shall reimburse EPA all costs of the response action not inconsistent with the NCP
4 pursuant to Section XVI (Payments for Response Costs), unless Settling Defendants invoke
5 dispute resolution proceedings under Section XIX of this Consent Decree and to the extent they
6 prevail in such dispute resolution proceedings.

7
8 50. Nothing in the preceding Paragraph or in this Consent Decree shall be deemed to
9 limit any authority of the United States a) to take all appropriate action to protect human health
10 and the environment or to prevent, abate, respond to, or minimize an actual or threatened release
11 of Waste Material on, at, or from the Head of the Hylebos Site, or b) to direct or order such
12 action, or seek an order from the Court, to protect human health and the environment or to
13 prevent, abate, respond to, or minimize an actual or threatened release of Waste Material on, at,
14 or from the Head of the Hylebos Site, subject to Section XXI (Covenants by Plaintiff).

15 XVI. PAYMENTS FOR RESPONSE COSTS

16 51. Payments for Future Response Costs.

17
18 a.. Settling Defendants shall pay to EPA all Future Response Costs performed
19 prior to the Certification of the Work under Section XIV of this Consent Decree that are not
20 inconsistent with the National Contingency Plan. However, Settling Defendants shall pay fifty
21 percent of each bill for Future Oversight Costs until EPA has billed Settling Defendants for
22 \$1,000,000 in Future Oversight Costs. After EPA has billed \$1,000,000 and Settling Defendants
23 have reimbursed EPA for \$500,000 in Future Oversight Costs, Settling Defendants shall pay to
24 EPA any and all additional Future Oversight Costs. On a periodic basis the United States will
25 send Settling Defendants a bill requiring payment that includes a Superfund Cost Recovery
26

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1 Package Imaging and Online System (SCORPIOS) certified summary. Settling Defendants shall
2 make all payments within thirty (30) days of Settling Defendants' receipt of each bill requiring
3 payment, except as otherwise provided in Paragraph 52. Settling Defendants shall make all
4 payments required by this Paragraph by a certified or cashier's check or checks or wire transfer
5 made payable to "EPA Hazardous Substance Superfund," referencing the name and address of
6 the party making the payment, EPA Site/Spill ID Number 108N, and DOJ Case Number 90-11-2-
7 726. Settling Defendants shall send check(s) to:

8 Mellon Bank
9 EPA-Region 10
10 ATTN: Superfund Accounting,
11 P.O. Box 360903M,
12 Pittsburgh, PA 15251

13 b. At the time of payment, Settling Defendants shall send notice that payment
14 has been made to the United States, to EPA and to the Regional Financial Management Officer,
15 in accordance with Section XXVI (Notices and Submissions).

16 c. The total amount to be paid by Setting Defendants pursuant to
17 Subparagraph 51.a. shall be deposited in the Hylebos Waterway Problem Areas Special Account
18 within the EPA Hazardous Substance Superfund to be retained and used to conduct or finance
19 response actions at or in connection with the Hylebos Waterway Problem Area, or transferred by
20 EPA to the EPA Hazardous Substance Superfund.

21
22 52. Settling Defendants may contest payment of any Future Response Costs under
23 Paragraph 51 if they determine that the United States has made an accounting error or if they
24 allege that a cost item that is included represents costs that are inconsistent with the NCP. Such
25 objection shall be made in writing within thirty (30) days of receipt of the bill and must be sent to

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1 the United States pursuant to Section XXVI (Notices and Submissions). Any such objection
2 shall specifically identify the contested Future Response Costs and the basis for objection. In the
3 event of an objection, the Settling Defendants shall within the 30-day period pay all uncontested
4 Future Response Costs to the United States in the manner described in Paragraph 51.
5 Simultaneously, the Settling Defendants shall establish an interest-bearing escrow account in a
6 federally-insured bank duly chartered in the State of Washington and remit to that escrow
7 account funds equivalent to the amount of the contested Future Response Costs. The Settling
8 Defendants shall send to the United States, as provided in Section XXVI (Notices and
9 Submissions), a copy of the transmittal letter and check paying the uncontested Future Response
10 Costs, and a copy of the correspondence that establishes and funds the escrow account, including,
11 but not limited to, information containing the identity of the bank and bank account under which
12 the escrow account is established as well as a bank statement showing the initial balance of the
13 escrow account. Simultaneously with establishment of the escrow account, the Settling
14 Defendants shall initiate the Dispute Resolution procedures in Section XIX (Dispute Resolution).
15 If the United States prevails in the dispute, within five (5) days of the resolution of the dispute,
16 the Settling Defendants shall pay the sums due (with accrued interest) to the United States in the
17 manner described in Paragraph 51. If the Settling Defendants prevail concerning any aspect of
18 the contested costs, the Settling Defendants shall pay that portion of the costs (plus associated
19 accrued interest) for which they did not prevail to the United States in the manner described in
20 Paragraph 51; Settling Defendants shall be disbursed any balance of the escrow account. The
21 dispute resolution procedures set forth in this Paragraph in conjunction with the procedures set
22 forth in Section XIX (Dispute Resolution) shall be the exclusive mechanisms for resolving
23 disputes regarding the Settling Defendants' obligation to reimburse the United States for its
24 Future Response Costs.

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1 53. In the event that the payments required by Paragraph 51 are not made within
2 thirty (30) days of the Settling Defendants' receipt of the bill, Settling Defendants shall pay
3 Interest on the unpaid balance. The Interest on Future Response Costs shall begin to accrue on
4 the date of receipt of the bill. The Interest shall accrue through the date of the Settling
5 Defendant's payment. Payments of Interest made under this Paragraph shall be in addition to
6 such other remedies or sanctions available to Plaintiffs by virtue of Settling Defendants' failure to
7 make timely payments under this Section including, but not limited to, payment of stipulated
8 penalties pursuant to Paragraph 79. The Settling Defendants shall make all payments required
9 by this Paragraph in the manner described in Paragraph 51.

10 54. Payment of Settlement Funds to Settling Defendants. EPA shall disburse funds
11 from the Hylebos Waterway Problem Areas Escrow Account to the Head of the Hylebos Cleanup
12 Account when the following conditions are satisfied: (1) this Consent Decree is entered by the
13 Court; (2) Settling Defendants have established appropriate financial assurances in accordance
14 with Section XIII (Assurance of Ability to Complete Work); (3) the Cash-Out Consent Decree
15 has been entered by the Court and the parties to the Cash-Out Consent Decree have delivered
16 funds to the Hylebos Waterway Problem Areas Escrow Account in accordance with the terms of
17 the Cash-Out Consent Decree and its appended Escrow Agreement; (4) an initial distribution of
18 \$434,733.00 has been made from the Hylebos Waterway Problem Areas Escrow Account to the
19 EPA Hylebos Waterway Problem Areas Special Account in accordance with paragraph 6 of the
20 Escrow Agreement appended to the Cash-Out Consent Decree; (5) the Settling Defendants
21 provide to EPA a copy of a fully executed agreement between Settling Defendants, the Port of
22 Tacoma and Occidental Chemical (or, in the alternative, provide to EPA a signed final decision
23 by a neutral mediator/arbitrator) setting forth a fixed percentage of the remaining funds in the
24 Hylebos Waterway Problem Areas Escrow Account to be distributed to the Head of Cleanup
25 Account when such additional funds are available pursuant to the terms and conditions of the

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1 Cash-Out Consent Decree; and (6) the Settling Defendants demonstrate that they have
2 established the Head of the Hylebos Cleanup Account.

3
4 55. Upon satisfaction of the conditions set forth in Paragraph 54, and the Settling
5 Defendants provisions of instructions for transferring funds from the Hylebos Waterway Problem
6 Areas Escrow Account to the Head of the Hylebos Cleanup Account, EPA shall take action
7 sufficient to cause a distribution of the funds pursuant to paragraph 6 of the Escrow Agreement
8 appended to the Cash-Out Consent Decree. In accordance with the agreement (or decision)
9 described in condition (5) of Paragraph 54, and the instructions for transferring funds provided
10 by Settling Defendants, the appropriate fixed percentage of all remaining funds in Escrow
11 Account shall be disbursed to the Head of the Hylebos Cleanup Account, less one-half fees to be
12 paid pursuant to paragraph 9 of the Escrow Agreement appended to the Cash-Out Consent
13 Decree.

14 56. The Head of the Hylebos Cleanup Account shall be maintained as a separate
15 account, and shall only include proceeds distributed to this Account pursuant to Paragraph 55 of
16 this Consent Decree and any interest that accrues thereon. Funds from the Head of the Hylebos
17 Cleanup Account shall only be used to pay invoices for Work performed after the effective date
18 of this Consent Decree. The Settling Defendants shall provide to EPA quarterly statements
19 showing the Head of the Hylebos Account balance and identifying all invoices paid with Head of
20 the Hylebos Account funds. The Settling Defendants shall provide EPA with all invoices if
21 requested by EPA. All funds remaining in the Head of the Hylebos Cleanup Account shall be
22 transferred to EPA within three days of any of the following circumstances: (1) EPA certifies
23 completion of the Work pursuant to Paragraph 48 of the Consent Decree; (2) EPA assumes
24 performance of the Work pursuant to Paragraph 94 of this Consent Decree; or (3) both Settling
25 Defendants become insolvent or cease performing the Work.

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1 57. Creation of Head of the Hylebos Disbursement Special Account and Agreement to
2 Disburse Funds to Settling Defendants. Within 30 days of the day the Hylebos Waterway Special
3 Account receives monies (including proceeds from the sale of any Kaiser stock or other Kaiser
4 assets) that EPA will receive in compensation for EPA's allowed general unsecured claim
5 pursuant to the Consent Decree entered in In Re: Kaiser Aluminum Corporation, Case No. 02-
6 10429 (JFK), Chapter 11, (USBC D.Del)(the "Kaiser Recovery"), but no sooner than 30 days
7 after the Effective Date, EPA shall establish a new special account, the Head of the Hylebos
8 Disbursement Special Account, within the EPA Hazardous Substance Superfund and shall
9 transfer sixty percent (60%) of the monies it receives as a result of the Kaiser Recovery from the
10 Hylebos Waterway Special Account to the Head of the Hylebos Disbursement Special Account.
11 Subject to the terms and conditions set forth in this Section, EPA agrees to make the funds in the
12 Head of the Hylebos Disbursement Special Account, including Interest Earned on the funds in
13 the Head of the Hylebos Disbursement Special Account, available for disbursement to Settling
14 Defendants as partial reimbursement for performance of the Work under this Consent Decree.
15 EPA shall disburse funds from the Head of the Hylebos Disbursement Special Account to
16 Settling Defendants in accordance with the procedures and milestones for phased disbursement
17 set forth in this Section.

18 58. Timing, Amount and Method of Disbursing Funds From the Head of the Hylebos
19 Disbursement Special Account. Within forty-five (45) days of EPA's receipt of a Cost Summary
20 and Certification, as defined by Subparagraph 59.b, or if EPA has requested additional
21 information under Subparagraph 59.b or a revised Cost Summary and Certification under
22 Subparagraph 59.b, within thirty (30) days of receipt of the additional information or revised
23 Cost Summary and Certification, and subject to the conditions set forth in this Section, EPA shall
24 disburse the funds from the Head of the Hylebos Disbursement Special Account at the
25 completion of the following milestones, and in the amounts set forth:

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Milestone

Disbursement of Funds

- | | |
|--|---|
| 1. EPA approval of the Remedial
Action Work Plan | 50 % of funds from the Head of the Hylebos
Disbursement Special Account |
| 2. EPA certification of completion of
of Remedial Action Construction | Remaining 50 % of funds from the Head
of the Hylebos Disbursement Special
Account |

EPA shall disburse the funds from the Head of Hylebos Disbursement Special Account to the Settling Defendants in the following manner:

59. Requests for Disbursement of Special Account Funds.

a. Within thirty (30) days of issuance of EPA's written confirmation that a milestone of the Work, as defined in Paragraph 58, has been satisfactorily completed, Settling Defendants shall submit to EPA a Cost Summary and Certification, as defined in Subparagraph 59.b, covering the Work performed pursuant to this Consent Decree up to the date of completion of that milestone. Settling Defendants shall not include in any submission costs included in a previous Cost Summary and Certification following completion of an earlier milestone of the Work if those costs have been previously reimbursed pursuant to Paragraph 58.

b. Each Cost Summary and Certification shall include a complete and accurate written cost summary and certification of the necessary costs incurred and paid by Settling Defendants for the Work covered by the particular submission, excluding costs not eligible for disbursement under Paragraph 60. Each Cost Summary and Certification shall contain the following statement signed by the Chief Financial Officer of a Settling Defendant:

"To the best of my knowledge, after thorough investigation and review of Settling Defendants' documentation of costs incurred and paid for Work performed pursuant to

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1 this Consent Decree [insert, as appropriate, "up to the date of completion of milestone 1,"
2 "between the date of completion of milestone 1 and the date of completion of milestone
3 2,"] I certify that the information contained in or accompanying this submittal is true,
4 accurate, and complete. I am aware that there are significant penalties for knowingly
5 submitting false information, including the possibility of fine and imprisonment."

6 The Chief Financial Officer of a Settling Defendant shall also provide EPA a list of the
7 documents that he or she reviewed in support of the Cost Summary and Certification. Upon
8 request by EPA, Settling Defendants shall submit to EPA any additional information that EPA
9 deems necessary for its review and approval of a Cost Summary and Certification.
10

11 c. If EPA finds that a Cost Summary and Certification includes a
12 mathematical accounting error, costs excluded under Paragraph 60, costs that are inadequately
13 documented, or costs submitted in a prior Cost Summary and Certification, it will notify Settling
14 Defendants and provide an opportunity to cure the deficiency by submitting a revised Cost
15 Summary and Certification. If Settling Defendants fail to cure the deficiency within thirty (30)
16 days after being notified of, and given the opportunity to cure, the deficiency, EPA will
17 recalculate Settling Defendants' costs eligible for disbursement for that submission and disburse
18 the corrected amount to Settling Defendants in accordance with the procedures in Paragraph 58
19 of this Section. Settling Defendants may dispute EPA's recalculation under this Paragraph
20 pursuant to Section XIX (Dispute Resolution). In no event shall Settling Defendants be
21 disbursed funds from the Head of the Hylebos Disbursement Special Account in excess of
22 amounts properly documented in a Cost Summary and Certification accepted or modified by
23 EPA.

24 60. Costs Excluded from Disbursement. The following costs are excluded from, and
25 shall not be sought by Settling Defendants for, disbursement from the Head of the Hylebos
26

1 Disbursement Special Account: (a) response costs paid pursuant to Section XVI; (b) any other
2 payments made by Settling Defendants to the United States pursuant to this Consent Decree,
3 including, but not limited to, any interest or stipulated penalties paid pursuant to Sections XX;
4 (c) attorneys' fees and costs, except for reasonable attorneys' fees and costs necessarily related to
5 obtaining access or institutional controls as required by Section IX; (d) costs of any response
6 activities Settling Defendants perform that are not required under, or approved by EPA pursuant
7 to, this Consent Decree; (e) costs related to Settling Defendants' litigation, settlement,
8 development of potential contribution claims or identification of defendants; (f) internal costs of
9 Settling Defendants, including but not limited to, salaries, travel, or in-kind services, except for
10 those costs that represent the work of employees of Settling Defendants directly performing the
11 Work; (g) any costs incurred by Settling Defendants prior to the Effective Date except for
12 approved Work completed pursuant to this Consent Decree; or (h) any costs incurred by Settling
13 Defendants pursuant to Section XIX (Dispute Resolution).

14
15 61. Termination of Disbursements from the Special Account. EPA's obligation to
16 disburse funds from the Head of the Hylebos Disbursement Special Account under this Consent
17 Decree shall terminate upon EPA's determination that Settling Defendants: (a) have knowingly
18 submitted a materially false or misleading Cost Summary and Certification; (b) have submitted a
19 materially inaccurate or incomplete Cost Summary and Certification, and have failed to correct
20 the materially inaccurate or incomplete Cost Summary and Certification within thirty (30) days
21 after being notified of, and given the opportunity to cure, the deficiency; or (c) failed to submit a
22 Cost Summary and Certification as required by Paragraph 59 within thirty (30) days (or such
23 longer period as EPA agrees) after being notified that EPA intends to terminate its obligation to
24 make disbursements pursuant to this Section because of Settling Defendants' failure to submit
25 the Cost Summary and Certification as required by Paragraph 59. EPA's obligation to disburse
26 funds from the Head of the Hylebos Disbursement Special Account shall also terminate upon

1 EPA's assumption of performance of any portion of the Work pursuant to Paragraph 94, when
2 such assumption of performance of the Work is not challenged by Settling Defendants or, if
3 challenged, is upheld under Section XIX (Dispute Resolution). Settling Defendants may dispute
4 EPA's termination of special account disbursements under Section XIX (Dispute Resolution).

5
6 62. Recapture of Special Account Disbursements. Upon termination of
7 disbursements from the Head of the Hylebos Disbursement Special Account under Paragraph 61,
8 if EPA has previously disbursed funds from the Head of the Hylebos Disbursement Special
9 Account for activities specifically related to the reason for termination (e.g., discovery of a
10 materially false or misleading submission after disbursement of funds based on that submission),
11 EPA shall submit a bill to Settling Defendants for those amounts already disbursed from the
12 Head of the Hylebos Disbursement Special Account specifically related to the reason for
13 termination, plus Interest on that amount covering the period from the date of disbursement of
14 the funds by EPA to the date of repayment of the funds by Settling Defendants. Within thirty
15 (30) days of receipt of EPA's bill, Settling Defendants shall reimburse the Hazardous Substance
16 Superfund for the total amount billed by a certified or cashier's check or checks made payable to
17 "EPA Hazardous Substance Superfund," referencing the name and address of the party making
18 payment, EPA Site/Spill Identification Number 108N, and DOJ Case Number 90-11-2-726.
19 Settling Defendants shall send check(s) to:

20 Mellon Bank
21 EPA-Region 10
22 ATTN: Superfund Accounting,
23 P.O. Box 360903M,
24 Pittsburgh, PA 15251

25 At the time of payment, Settling Defendants shall send notice that payment has been made to the
26 United States, to EPA to the Regional Financial Management Officer, in accordance with Section

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1 XXVI (Notices and Submissions). Upon receipt of payment, EPA may deposit all or any portion
2 thereof in the Hylebos Waterway Special Account, the Head of the Hylebos Disbursement
3 Special Account, or the Hazardous Substance Superfund. The determination of where to deposit
4 or how to use the funds shall not be subject to challenge by Settling Defendants pursuant to the
5 dispute resolution provisions of this Consent Decree or in any other forum. Settling Defendants
6 may dispute EPA's determination as to recapture of funds pursuant to Section XIX (Dispute
7 Resolution).

8
9 63. Balance of Special Account Funds. After EPA issues its written Certification of
10 Completion of the Remedial Action pursuant to this Consent Decree, and after EPA completes
11 all disbursement(s) to Settling Defendants in accordance with this Section, if any funds remain in
12 the Head of the Hylebos Disbursement Special Account, EPA may transfer such funds to the
13 Hylebos Waterway Special Account or to the Hazardous Substance Superfund. Any transfer of
14 funds to the Hylebos Waterway Special Account or the Hazardous Substance Superfund shall not
15 be subject to challenge by Settling Defendants pursuant to the dispute resolution provisions of
16 this Consent Decree or in any other forum.

17 XVII. INDEMNIFICATION AND INSURANCE

18 64. Settling Defendants' Indemnification of the United States

19
20 a. The United States does not assume any liability by entering into this
21 agreement or by virtue of any designation of Settling Defendants as EPA's authorized
22 representatives under Section 104(e) of CERCLA. Settling Defendants shall indemnify, save and
23 hold harmless the United States and its officials, agents, employees, contractors, subcontractors,
24 or representatives for or from any and all claims or causes of action arising from, or on account
25 of, negligent or other wrongful acts or omissions of Settling Defendants, their officers, directors,
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1 employees, agents, contractors, subcontractors, and any persons acting on their behalf or under
2 their control, in carrying out activities pursuant to this Consent Decree, including, but not limited
3 to, any claims arising from any designation of Settling Defendants as EPA's authorized
4 representatives under Section 104(e) of CERCLA. Further, the Settling Defendants agree to pay
5 the United States all costs it incur including, but not limited to, attorneys fees and other expenses
6 of litigation and settlement arising from, or on account of, claims made against the United States
7 based on negligent or other wrongful acts or omissions of Settling Defendants, their officers,
8 directors, employees, agents, contractors, subcontractors, and any persons acting on their behalf
9 or under their control, in carrying out activities pursuant to this Consent Decree. The United
10 States shall not be held out as a party to any contract entered into by or on behalf of Settling
11 Defendants in carrying out activities pursuant to this Consent Decree. Neither the Settling
12 Defendants nor any such contractor shall be considered an agent of the United States. The
13 United States shall give Settling Defendants notice of any claim for which the United States
14 plans to seek indemnification pursuant to this Paragraph and shall consult with Settling
15 Defendants prior to settling such claim.

16
17 65. Settling Defendants waive all claims against the United States for damages or
18 reimbursement or for set-off of any payments made or to be made to the United States, arising
19 from or on account of any contract, agreement, or arrangement between any one or more of
20 Settling Defendants and any person for performance of Work on or relating to the Head of the
21 Hylebos Site, including, but not limited to, claims on account of construction delays. In addition,
22 Settling Defendants shall indemnify and hold harmless the United States with respect to any and
23 all claims for damages or reimbursement arising from or on account of any contract, agreement,
24 or arrangement between any one or more of Settling Defendants and any person for performance
25 of Work on or relating to the Head of the Hylebos Site, including, but not limited to, claims on
26 account of construction delays.

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66. No later than fifteen (15) days before commencing any on-site Work, Settling Defendants shall secure, and shall maintain until the first anniversary of EPA's Certification of Completion of the Remedial Action pursuant to Subparagraph 47.b. of Section XIV (Certification of Completion) comprehensive general liability insurance with limits of \$25 million combined single limit, and automobile liability insurance with limits of \$5 million dollars, combined single limit, naming the United States as an additional insured. In addition, for the duration of this Consent Decree, Settling Defendants shall satisfy, or shall ensure that their contractors or subcontractors satisfy, all applicable laws and regulations regarding the provision of worker's compensation insurance for all persons performing the Work on behalf of Settling Defendants in furtherance of this Consent Decree. Prior to commencement of the Work under this Consent Decree, Settling Defendants shall provide to EPA certificates of such insurance and a copy of each insurance policy. Settling Defendants shall resubmit such certificates and copies of policies each year on the anniversary of the Effective Date. If Settling Defendants demonstrate by evidence satisfactory to EPA that any contractor or subcontractor maintains insurance equivalent to that described above, or insurance covering the same risks but in a lesser amount, then, with respect to that contractor or subcontractor, Settling Defendants need provide only that portion of the insurance described above which is not maintained by the contractor or subcontractor.

XVIII. FORCE MAJEURE

67. "Force majeure," for purposes of this Consent Decree, is defined as any event arising from causes beyond the control of the Settling Defendants, of any entity controlled by Settling Defendants, or of Settling Defendants' contractors, that delays or prevents the performance of any obligation under this Consent Decree despite Settling Defendants' best efforts to fulfill the obligation. The requirement that the Settling Defendants exercise "best efforts to

1 fulfill the obligation" includes using best efforts to anticipate any potential force majeure event
2 and best efforts to address the effects of any potential force majeure event (1) as it is occurring
3 and (2) following the potential force majeure event, such that the delay is minimized to the
4 greatest extent possible. "Force Majeure" does not include financial inability to complete the
5 Work or a failure to attain the Performance Standards.

6
7 68. If any event occurs or has occurred that may delay the performance of any
8 obligation under this Consent Decree, whether or not caused by a force majeure event, the
9 Settling Defendants shall notify orally EPA's Project Coordinator or, in his or her absence, EPA's
10 Alternate Project Coordinator or, in the event both of EPA's designated representatives are
11 unavailable, the Director of the Environmental Cleanup Office, EPA Region 10, within seventy-
12 two (72) hours of when Settling Defendants first knew that the event might cause a delay. If the
13 seventy-two (72) hour notification period expires on a Saturday, Sunday or federal holiday, the
14 Settling Defendants shall provide oral notice no later than 12:00 p.m. (Noon) on the next
15 working day. Within ten (10) days thereafter, Settling Defendants shall provide in writing to
16 EPA an explanation and description of the reasons for the delay; the anticipated duration of the
17 delay; all actions taken or to be taken to prevent or minimize the delay; a schedule for
18 implementation of any measures to be taken to prevent or mitigate the delay or the effect of the
19 delay; the Settling Defendants' rationale for attributing such delay to a force majeure event if they
20 intend to assert such a claim; and a statement as to whether, in the opinion of the Settling
21 Defendants, such event may cause or contribute to an endangerment to public health, welfare or
22 the environment. The Settling Defendants shall include with any notice all available
23 documentation supporting their claim that the delay was attributable to a force majeure. Failure
24 to comply with the above requirements shall preclude Settling Defendants from asserting any
25 claim of force majeure for that event for the period of time of such failure to comply, and for any
26 additional delay caused by such failure. Settling Defendants shall be deemed to know of any

1 circumstance of which Settling Defendants, any entity controlled by Settling Defendants, or
2 Settling Defendants' contractors knew or should have known.

3
4 69. If EPA agrees that the delay or anticipated delay is attributable to a force majeure
5 event, the time for performance of the obligations under this Consent Decree that are affected by
6 the force majeure event will be extended by EPA for such time as is necessary to complete those
7 obligations. An extension of the time for performance of the obligations affected by the force
8 majeure event shall not, of itself, extend the time for performance of any other obligation not
9 affected by the force majeure event. If EPA does not agree that the delay or anticipated delay has
10 been or will be caused by a force majeure event, EPA will notify the Settling Defendants in
11 writing of its decision. If EPA agrees that the delay is attributable to a force majeure event, EPA
12 will notify the Settling Defendants in writing of the length of the extension, if any, for
13 performance of the obligations affected by the force majeure event.

14 70. If the Settling Defendants elect to invoke the dispute resolution procedures set
15 forth in Section XIX (Dispute Resolution), they shall do so no later than thirty (30) days after
16 receipt of EPA's notice. In any such proceeding, Settling Defendants shall have the burden of
17 demonstrating by a preponderance of the evidence that the delay or anticipated delay has been or
18 will be caused by a force majeure event, that the duration of the delay or the extension sought
19 was or will be warranted under the circumstances, that best efforts were exercised to avoid and
20 mitigate the effects of the delay, and that Settling Defendants complied with the requirements of
21 Paragraphs 67 and 68, above. If Settling Defendants carry this burden, the delay at issue shall be
22 deemed not to be a violation by Settling Defendants of the affected obligation of this Consent
23 Decree identified to EPA and the Court.

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XIX. DISPUTE RESOLUTION

71. Unless otherwise expressly provided for in this Consent Decree, the dispute resolution procedures of this Section shall be the exclusive mechanism to resolve disputes arising under or with respect to this Consent Decree. However, the procedures set forth in this Section shall not apply to actions by the United States to enforce obligations of the Settling Defendants that have not been disputed in accordance with this Section.

72. Any dispute which arises under or with respect to this Consent Decree shall in the first instance be the subject of informal negotiations between the parties to the dispute. The period for informal negotiations shall not exceed twenty (20) days from the time the dispute arises, unless it is modified by written agreement of the parties to the dispute. The dispute shall be considered to have arisen when one party sends the other party a written Notice of Dispute.

73. Statements of Position.

a. In the event that the parties cannot resolve a dispute by informal negotiations under the preceding Paragraph, then the position advanced by EPA shall be considered binding unless, within twenty (20) days after the conclusion of the informal negotiation period, Settling Defendants invoke the formal dispute resolution procedures of this Section by serving on the United States a written Statement of Position on the matter in dispute, including, but not limited to, any factual data, analysis or opinion supporting that position and any supporting documentation relied upon by the Settling Defendants. The Statement of Position shall specify the Settling Defendants' position as to whether formal dispute resolution should proceed under Paragraph 74 or Paragraph 75.

b. Within 20 days after receipt of Settling Defendants' Statement of Position, EPA will serve on Settling Defendants its Statement of Position, including, but not limited to,

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1 any factual data, analysis, or opinion supporting that position and all supporting documentation
2 relied upon by EPA. EPA's Statement of Position shall include a statement as to whether formal
3 dispute resolution should proceed under Paragraph 74 or 75. Within 7 days after receipt of EPA's
4 Statement of Position, Settling Defendants may submit a Reply.

5
6 c. If there is disagreement between EPA and the Settling Defendants as to
7 whether dispute resolution should proceed under Paragraph 74 or 75, the parties to the dispute
8 shall follow the procedures set forth in the paragraph determined by EPA to be applicable.
9 However, if the Settling Defendants ultimately appeal to the Court to resolve the dispute, the
10 Court shall determine which paragraph is applicable in accordance with the standards of
11 applicability set forth in Paragraphs 74 and 75.

12 74. Formal dispute resolution for disputes pertaining to the selection or adequacy of
13 any response action and all other disputes that are accorded review on the administrative record
14 under applicable principles of administrative law shall be conducted pursuant to the procedures
15 set forth in this Paragraph. For purposes of this Paragraph, the adequacy of any response action
16 includes, without limitation: (1) the adequacy or appropriateness of plans, procedures to
17 implement plans, or any other items requiring approval by EPA under this Consent Decree; and
18 (2) the adequacy of the performance of response actions taken pursuant to this Consent Decree.
19 Nothing in this Consent Decree shall be construed to allow any dispute by Settling Defendants
20 regarding the validity of the ROD's provisions.

21 a. An administrative record of the dispute shall be maintained by EPA and
22 shall contain all statements of position, including supporting documentation, submitted pursuant
23 to this Section. Where appropriate, EPA may allow submission of supplemental statements of
24 position by the parties to the dispute.
25

1 b. The Director of the Environmental Cleanup Office, EPA Region 10, will
2 issue a final administrative decision resolving the dispute based on the administrative record
3 described in Paragraph 74.a. This decision shall be binding upon the Settling Defendants,
4 subject only to the right to seek judicial review pursuant to Paragraph 74.c. and d.

5 c. Any administrative decision made by EPA pursuant to Paragraph 74.b.
6 shall be reviewable by this Court, provided that a motion for judicial review of the decision is
7 filed by the Settling Defendants with the Court and served on all Parties within twenty (20) days
8 of receipt of the final decision by the Director of the Environmental Cleanup Office, EPA Region
9 10. The motion shall include a description of the matter in dispute, the efforts made by the
10 parties to resolve it, the relief requested, and the schedule, if any, within which the dispute must
11 be resolved to ensure orderly implementation of this Consent Decree. The United States may file
12 a response to Settling Defendants' motion within twenty (20) days of receipt of the motion or
13 within any different time frame that the local court rules may provide, and Settling Defendants
14 may file a reply brief within five (5) days of receipt of the response or such different time frame
15 that the local court rules may provide.

16 d. In proceedings on any dispute governed by this Paragraph, Settling
17 Defendants shall have the burden of demonstrating that the decision of the Environmental
18 Cleanup Office Director is arbitrary and capricious or otherwise not in accordance with law.
19 Judicial review of EPA's decision shall be on the administrative record compiled pursuant to
20 Paragraph 74.a.
21

22 75. Formal dispute resolution for disputes that neither pertain to the selection or
23 adequacy of any response action nor are otherwise accorded review on the administrative record
24 under applicable principles of administrative law, shall be governed by this Paragraph.
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1 a. Following receipt of Settling Defendants' Statement of Position submitted
2 pursuant to Paragraph 73, the Director of the Environmental Cleanup Office, EPA Region 10,
3 will issue a final decision resolving the dispute. The Environmental Cleanup Office Director's
4 decision shall be binding on the Settling Defendants unless, within twenty (20) days of receipt of
5 the decision, the Settling Defendants file with the Court and serve on the parties a motion for
6 judicial review of the decision setting forth the matter in dispute, the efforts made by the parties
7 to resolve it, the relief requested, and the schedule, if any, within which the dispute must be
8 resolved to ensure orderly implementation of the Consent Decree. The United States may file a
9 response to Settling Defendants' motion within twenty (20) days of receipt of the motion or
10 within any different time frame that the local court rules may provide, and Settling Defendants
11 may file a reply brief within five (5) days of receipt of the response or such different time frame
12 that the local court rules may provide.

13 b. Notwithstanding Paragraph V of Section I (Background) of this Consent
14 Decree, judicial review of any dispute governed by this Paragraph shall be governed by
15 applicable principles of law.
16

17 76. The invocation of formal dispute resolution procedures under this Section shall
18 not extend, postpone or affect in any way any obligation of the Settling Defendants under this
19 Consent Decree, not directly in dispute, unless EPA or the Court agrees otherwise. Stipulated
20 penalties with respect to the disputed matter shall continue to accrue but payment shall be stayed
21 pending resolution of the dispute as provided in Paragraph 85. Notwithstanding the stay of
22 payment, stipulated penalties shall accrue from the first day of noncompliance with any
23 applicable provision of this Consent Decree. In the event that the Settling Defendants do not
24 prevail on the disputed issue, stipulated penalties shall be assessed and paid as provided in
25 Section XX (Stipulated Penalties).
26

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XX. STIPULATED PENALTIES

77. Settling Defendants shall be liable for stipulated penalties in the amounts set forth in Paragraphs 78 and 79 to the United States for failure to comply with the requirements of this Consent Decree specified below, unless excused under Section XVIII (Force Majeure) or otherwise resolved in Dispute Resolution. "Compliance" by Settling Defendants shall include completion of the activities under this Consent Decree or SOW or other Work plan approved under this Consent Decree identified below in accordance with all applicable requirements of law, this Consent Decree, the SOW, and any plans or other documents approved by EPA pursuant to this Consent Decree and within the specified time schedules established by and approved under this Consent Decree.

78. Stipulated Penalty Amounts - Work.

a. The following stipulated penalties shall accrue per violation per day for any noncompliance identified in Subparagraph 78.b after the opportunity to cure submissions pursuant to Section XI of this Consent Decree, if applicable:

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$1,000	1st through 30th day
\$5,000	31st through 60th day
\$8,000	61st day and beyond

b. Compliance Milestones.

1. (100%) Final Design - failure to submit timely or adequate draft and revised final drafts

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2. Remedial Action Work Plan - failure to submit timely or adequate draft and revised final drafts
3. Remedial Action Construction Schedules -- failure to perform remedial action construction or any discrete phases and/or individual components of the remedial action on the approved schedule or in an adequate manner or not in compliance with the SOW, approved remedial design, or approved remedial action work plan or deliverables
4. Completion Reports - failure to submit timely or adequate completion reports listed below
 - a. Remedial Action Construction Report
 - b. Remedial Action Completion Report
5. Operation, Maintenance and Monitoring
 - a. failure to perform timely and adequate monitoring in accordance with the approved OMMP and approved schedule
 - b. failure to submit timely and adequate monitoring reports
 - c. failure to perform maintenance on any component of the remedial action on the required schedule and in accordance with approved work plans or EPA requests

1 79. Stipulated Penalty Amounts - Reports, Other Deliverables, and Other Violations
2 of the Consent Decree.

3 a. The following stipulated penalties shall accrue per violation per day for
4 failure to submit timely or adequate monthly progress reports, any deliverable required by the
5 SOW or this Consent Decree after the opportunity to cure submissions pursuant to Section XI of
6 this Consent Decree, except those listed in Paragraph 78.b. above, or any other violation of this
7 Consent Decree, including, but not limited to, late payments required under this Consent Decree :
8

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$500	1st through 14th day
\$1,000	15th through 30th day
\$2,500	31st day and beyond

15 80. In the event that EPA assumes performance of a portion or all of the Work
16 pursuant to Paragraph 94 of Section XXI (Covenants Not to Sue by Plaintiff), Settling
17 Defendants shall be liable for a stipulated penalty in the amount of three times the cost incurred
18 by EPA to perform the work or \$1,000,000, whichever is less.

19 81. All penalties shall begin to accrue on the day after the complete performance is
20 due or the day a violation occurs, except as otherwise provided in this Consent Decree, and shall
21 continue to accrue through the final day of the correction of the noncompliance or completion of
22 the activity. However, stipulated penalties shall not accrue: (1) with respect to a deficient
23 submission under Section XI (EPA Approval of Plans and Other Submissions), until receipt of
24 the second notice of deficiency during the period, if any, beginning on the 21st day after EPA's
25 receipt of such submission until the date that EPA notifies Settling Defendants of any deficiency;
26

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(2) with respect to a decision by the Director of the Environmental Cleanup Office, EPA Region 10, under Paragraph 74.b. or 75.a of Section XIX (Dispute Resolution), during the period, if any, beginning on the 21st day after the date that Settling Defendants' reply to EPA's Statement of Position is received until the date that the Director issues a final decision regarding such dispute; or (3) with respect to judicial review by this Court of any dispute under Section XIX (Dispute Resolution), during the period, if any, beginning on the 31st day after the Court's receipt of the final submission regarding the dispute until the date that the Court issues a final decision regarding such dispute. Nothing herein shall prevent the simultaneous accrual of separate penalties for separate violations of this Consent Decree.

82. Following EPA's determination that Settling Defendants have failed to comply with a requirement of this Consent Decree, EPA may give Settling Defendants written notification of the same and describe the noncompliance. For violations based on submissions or Work being inadequately prepared or performed, EPA shall provide written notification and describe the noncompliance. EPA shall send the Settling Defendants a written demand for the payment of the penalties. However, penalties shall begin accruing as provided in the preceding Paragraph regardless of whether EPA has notified the Settling Defendants of a violation or when the demand is sent.

83. All penalties accruing under this Section shall be due and payable to the United States within thirty (30) days of the Settling Defendants' receipt from EPA of a demand for payment of the penalties, unless Settling Defendants invoke the Dispute Resolution procedures under Section XIX (Dispute Resolution). All payments of stipulated penalties made under this Paragraph shall be identified as "stipulated penalties" and shall be made by certified or cashier's check made payable to "EPA Hazardous Substance Superfund," shall be mailed to Mellon Bank, EPA-Region 10, ATTN Superfund Accounting, P.O. Box 360903M, Pittsburgh, PA 15251, shall

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1 indicate that the payment is for stipulated penalties, and shall reference the EPA Region and
2 Site/Spill ID, and DOJ Case Number 90-11-2-726, and the name and address of the party making
3 payment. Copies of check(s) paid pursuant to this Section, and any accompanying transmittal
4 letter(s), shall be sent to the United States as provided in Section XXVI (Notices and
5 Submissions), and to the EPA Regional Financial Management Officer.

6
7 84. The payment of penalties shall not alter in any way Settling Defendants' obligation
8 to complete the performance of the Work required under this Consent Decree.

9 85. Penalties shall continue to accrue as provided in Paragraph 81 during any dispute
10 resolution period, but need not be paid until the following:

11 a. If the dispute is resolved by agreement or by a decision of EPA that is not
12 appealed to this Court, accrued penalties determined to be owing shall be paid to EPA within
13 fifteen (15) days of the agreement or the receipt of EPA's decision or order;

14 b. If the dispute is appealed to this Court and the United States prevails in
15 whole or in part, Settling Defendants shall pay all accrued penalties determined by the Court to
16 be owed to EPA within sixty (60) days of receipt of the Court's decision or order, except as
17 provided in Subparagraph c below;

18 c. If the United States prevails in whole or in part, and the District Court's
19 decision is appealed by any Party, Settling Defendants shall pay all accrued penalties determined
20 by the District Court to be owing to the United States into an interest-bearing escrow account
21 within 60 days of receipt of the Court's decision or order. Penalties shall be paid into this
22 account as they continue to accrue, at least every sixty (60) days. Within fifteen (15) days of
23 receipt of the final appellate court decision, the escrow agent shall pay the balance of the account
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1 to EPA or to Settling Defendants to the extent that they prevail. If the United States does not
2 prevail in whole or in part, no such penalties shall be assessed against Settling Defendants.

3
4 86. If Settling Defendants fail to pay stipulated penalties when due, the United States
5 may institute proceedings to collect the penalties, as well as interest. Settling Defendants shall
6 pay Interest on the unpaid balance, which shall begin to accrue on the date of demand made
7 pursuant to Paragraph 83.

8 87. Nothing in this Consent Decree shall be construed as prohibiting, altering, or in
9 any way limiting the ability of the United States to seek any other remedies or sanctions available
10 by virtue of Settling Defendants' violation of this Consent Decree or of the statutes and
11 regulations upon which it is based, including, but not limited to, penalties pursuant to Section
12 122(l) of CERCLA. Provided, however, that the United States shall not seek civil penalties
13 pursuant to Section 122(l) of CERCLA for any violation for which a stipulated penalty is
14 provided herein, except in the case of a willful violation of the Consent Decree.

15 88. Notwithstanding any other provision of this Section, the United States may, in its
16 unreviewable discretion, waive any portion of stipulated penalties that have accrued pursuant to
17 this Consent Decree.

18
19 XXI. COVENANTS BY PLAINTIFF

20 89. In consideration of the actions and commitments that will be performed and the
21 payments that will be made by the Settling Defendants under the terms of the Consent Decree,
22 and except as specifically provided in Paragraphs 90, 91, and 93 of this Section, the United States
23 covenants not to sue or to take administrative action against Settling Defendants pursuant to
24 Sections 106 and 107(a) of CERCLA relating to the Hylebos Waterway Problem Area. Except
25 with respect to future liability, these covenants not to sue shall take effect upon the Effective
26

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1 Date of this Consent Decree. With respect to future liability for the Head of the Hylebos
2 Waterway Problem Area, these covenants shall take effect upon Certification of Completion of
3 Remedial Action by EPA for the Hylebos Waterway Problem Area pursuant to Paragraph 47.b of
4 Section XIV (Certification of Completion). With respect to future liability for the Mouth of the
5 Hylebos Waterway Problem Area, these covenants shall take effect upon Certification of
6 Completion of Remedial Action by EPA for the Mouth of the Hylebos Waterway Problem Area.
7 These covenants are conditioned upon the satisfactory performance by Settling Defendants of
8 their obligations under this Consent Decree. These covenants not to sue extend only to the
9 Settling Defendants and do not extend to any other person.

10 90. United States' Pre-certification Reservations. Notwithstanding any other
11 provision of this Consent Decree, the United States reserves, and this Consent Decree is without
12 prejudice to, the right to institute proceedings in this action or in a new action, or to issue an
13 administrative order seeking to compel Settling Defendants,
14

15 a. to perform further response actions relating to the Hylebos Waterway
16 Problem Area or

17 b. to reimburse the United States for additional costs of response if, prior to
18 Certification of Completion of the Remedial Action:
19

20 1. conditions at the Hylebos Waterway Problem Area, previously
21 unknown to EPA, are discovered, or

22 2. information, previously unknown to EPA, is received, in whole or
23 in part,
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25
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1 and EPA determines that these previously unknown conditions or information together with any
2 other relevant information indicates that the Remedial Action is not protective of human health
3 or the environment.

4 91. United States' Post-certification Reservations. Notwithstanding any other
5 provision of this Consent Decree, the United States reserves, and this Consent Decree is without
6 prejudice to, the right to institute proceedings in this action or in a new action, or to issue an
7 administrative order seeking to compel Settling Defendants,

8
9 a. to perform further response actions relating to the Hylebos Waterway
10 Problem Area or

11 b. to reimburse the United States for additional costs of response if,
12 subsequent to Certification of Completion of the Remedial Action:

13
14 1. conditions at the Hylebos Waterway Problem Area, previously
15 unknown to EPA, are discovered, or

16 2. information, previously unknown to EPA, is received, in whole or
17 in part,
18

19 and EPA determines that these previously unknown conditions or this information together with
20 other relevant information indicate that the Remedial Action is not protective of human health or
21 the environment.

22 92. For purposes of Paragraph 90, the information and the conditions known to EPA
23 shall include only that information and those conditions known to EPA as of the date this
24 Consent Decree is lodged as set forth in the Record of Decision, the administrative records
25 supporting the Record of Decision, the July 1997 and August 2000 ESDs, and any EPA approved
26

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1 remedial design submittal generated by the Settling Defendants as of the date this Consent
2 Decree is lodged. For purposes of Paragraph 91, the information and the conditions known to
3 EPA shall include only that information and those conditions known to EPA as of the date of
4 Certification of Completion of the Remedial Action as set forth in the Record of Decision, the
5 administrative records supporting the Record of Decision and July, 1997 and August, 2000
6 ESDs, and any information received by EPA pursuant to the requirements of this Consent Decree
7 prior to Certification of Completion of the Remedial Action.

8
9 93. General reservations of rights. The United States reserves, and this Consent
10 Decree is without prejudice to, all rights against Settling Defendants with respect to all matters
11 not expressly included within Plaintiff's covenant not to sue. Notwithstanding any other
12 provision of this Consent Decree, the United States reserves all rights against Settling Defendants
13 with respect to:

14 a. claims based on a failure by Settling Defendants to meet a requirement of
15 this Consent Decree;

16 b. liability arising from the past, present, or future disposal, release, or threat
17 of release of Waste Materials outside of the Hylebos Waterway Problem Area, including, but not
18 limited to, any other Problem Area or Operable Unit in the CB/NT Site;

19 c. future liability based upon the Settling Defendants' ownership or operation
20 of property within the Hylebos Waterway Problem Area, or upon the Settling Defendants'
21 transportation, treatment, storage, or disposal, or the arrangement for the transportation,
22 treatment, storage, or disposal of Waste Material at or in connection with the Hylebos Waterway
23 Problem Area, other than as provided in the ROD, the Work, or otherwise ordered by EPA, after
24 signature of this Consent Decree by the Settling Defendants;
25

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1 d. liability for hazardous substances buried at subsurface depths at the
2 Hylebos Waterway Problem Area as of the Effective Date of this Consent Decree and are located
3 within no action areas as designated in the August 2000 ESD which hazardous substances were
4 released by Settling Defendants or their tenants or came to be located on property owned or
5 operated by Settling Defendants and, in EPA's discretion, require response action;

6 e. liability for response actions in the Mouth of the Hylebos Waterway
7 Problem Area if other parties do not perform required response actions under an Order or a
8 consent decree;

9 f. liability for damages for injury to, destruction of, or loss of natural
10 resources, and for the costs of any natural resource damage assessments;

11 g. criminal liability;

12 h. liability for violations of federal or state law which occur during or after
13 implementation of the Remedial Action at the Hylebos Waterway; and

14 i. liability, prior to Certification of Completion of the Remedial Action at the
15 Head of the Hylebos Site, for additional response actions that EPA determines are necessary to
16 achieve Performance Standards, but that cannot be required pursuant to Paragraph 12
17 (Modification of the SOW or Related Work Plans);
18
19
20

21 94. Work Takeover. In the event EPA determines that Settling Defendants have
22 ceased implementation of any portion of the Work, are seriously or repeatedly deficient or late in
23 their performance of the Work, after providing Settling Defendants one opportunity to cure and
24 after notice to Settling Defendants, EPA may assume the performance of all or any portions of
25 the Work as EPA determines necessary. In the event EPA determines that Settling Defendants
26

1 are implementing the Work in a manner which may cause an endangerment to human health or
2 the environment, EPA may assume the performance of all or any portion of the Work as EPA
3 determines necessary without notice or opportunity to cure to Settling Defendants. Settling
4 Defendants may invoke the procedures set forth in Section XIX (Dispute Resolution), Paragraph
5 74, to dispute EPA's determination that takeover of the Work is warranted under this Paragraph.
6 Costs incurred by the United States in performing the Work pursuant to this Paragraph shall be
7 considered Future Response Costs that Settling Defendants shall pay pursuant to Section XVI
8 (Payments For Response Costs).

9
10 95. Notwithstanding any other provision of this Consent Decree, the United States
11 retains all authority and reserves all rights to take any and all response actions authorized by law.

12
13 XXII. COVENANTS BY SETTLING DEFENDANTS

14
15 96. Covenant Not to Sue by Settling Defendants. Subject to the reservations in
16 Paragraph 97, Settling Defendants hereby covenant not to sue and agree not to assert any claims
17 or causes of action against the United States with respect to the Hylebos Waterway Problem Area
18 or this Consent Decree, including, but not limited to:

19 a. any direct or indirect claim for reimbursement from the Hazardous
20 Substance Superfund (established pursuant to the Internal Revenue Code, 26 U.S.C. § 9507)
21 through CERCLA Sections 106(b)(2), 107, 111, 112, 113 or any other provision of law;
22

23 b. any claims against the United States, including any department, agency or
24 instrumentality of the United States under CERCLA Sections 107 or 113 related to the Hylebos
25 Waterway Problem Area, and with respect to such claims against the United States, the covenant
26

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1 not to sue shall take effect upon the United States' fulfillment of its obligations under Paragraph
2 13.b of the Cash-Out Consent Decree; or

3 c. any claims arising out of response activities at the Site, including claims
4 based on EPA's selection of response actions, oversight of response activities or approval of
5 plans for such activities, including any claim under the United States Constitution, the
6 Washington State Constitution, the Tucker Act, 28 U.S.C. § 1491, the Equal Access to Justice
7 Act, 28 U.S.C. § 2412, as amended, or at common law.

8
9 d. any direct or indirect claim for disbursement from the Hylebos Waterway
10 Problem Areas Special Account or the Head of the Hylebos Waterway Disbursement Special
11 Account, except as expressly provided in Section XVI (Payment for Response Costs).

12 97. The Settling Defendants reserve, and this Consent Decree is without prejudice to:

13
14 a. claims against the United States, subject to the provisions of Chapter 171
15 of Title 28 of the United States Code, for money damages for injury or loss of property or
16 personal injury or death caused by the negligent or wrongful act or omission of any employee of
17 the United States while acting within the scope of his office or employment under circumstances
18 where the United States, if a private person, would be liable to the claimant in accordance with
19 the law of the place where the act or omission occurred. However, any such claim shall not
20 include a claim for any damages caused, in whole or in part, by the act or omission of any person,
21 including any contractor, who is not a federal employee as that term is defined in 28 U.S.C.
22 § 2671; nor shall any such claim include a claim based on EPA's selection of response actions, or
23 the oversight or approval of the Settling Defendants' plans or activities. The foregoing applies
24 only to claims which are brought pursuant to any statute other than CERCLA and for which the
25 waiver of sovereign immunity is found in a statute other than CERCLA; and

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1 b. contribution claims against the United States arising out an action initiated
2 under 42 U.S.C. § 9607(f) for natural resource damages.

3 98. Nothing in this Consent Decree shall be deemed to constitute preauthorization of
4 a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R.
5 § 300.700(d).
6

7 XXIII. EFFECT OF SETTLEMENT; CONTRIBUTION PROTECTION

8 99. Nothing in this Consent Decree shall be construed to create any rights in, or grant
9 any cause of action to, any person not a Party to this Consent Decree. The preceding sentence
10 shall not be construed to waive or nullify any rights that any person not a signatory to this decree
11 may have under applicable law. Each of the Parties expressly reserves any and all rights
12 (including, but not limited to, any right to contribution), defenses, claims, demands, and causes
13 of action which each Party may have with respect to any matter, transaction, or occurrence
14 relating in any way to the CB/NT Site against any person not a Party hereto nor a Party to that
15 consent decree related to remedial action at the Mouth of the Hylebos Waterway Problem Area.
16

17 100. The Parties agree, and by entering this Consent Decree this Court finds, that the
18 Settling Defendants are entitled, as of the Effective Date, to protection from contribution actions
19 or claims as provided by CERCLA Section 113(f)(2), 42 U.S.C. § 9613(f)(2) for matters
20 addressed in this Consent Decree. "Matters Addressed" in this Consent Decree include all
21 response actions taken or to be taken, and all response costs incurred or to be incurred by the
22 United States, the Settling Defendants, the parties implementing remedial design and remedial
23 action in the Mouth of the Hylebos Waterway or any other person with respect to the Hylebos
24 Waterway Problem Area. Matters Addressed shall not include those response costs or response
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actions as to which the United States has reserved its rights under this Consent Decree, in the event that the United States asserts rights against Settling Defendants of this Consent Decree.

101. The Settling Defendants agree that with respect to any suit or claim for contribution brought by them for matters related to this Consent Decree they will notify the United States in writing no later than sixty (60) days prior to the initiation of such suit or claim.

102. The Settling Defendants also agree that with respect to any suit or claim for contribution brought against them for matters related to this Consent Decree they will notify in writing the United States within ten (10) days of service of the complaint on them. In addition, Settling Defendants shall notify the United States within ten (10) days of service or receipt of any Motion for Summary Judgment and within ten (10) days of receipt of any order from a court setting a case for trial.

103. In any subsequent administrative or judicial proceeding initiated by the United States for injunctive relief, recovery of response costs, or other appropriate relief relating to the CB/NT Site or Hylebos Waterway Problem Area, Settling Defendants shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, res judicata, collateral estoppel, issue preclusion, claim-splitting, or other defenses based upon any contention that the claims raised by the United States in the subsequent proceeding were or should have been brought in the instant case; provided, however, that nothing in this Paragraph affects the enforceability of the covenants not to sue set forth in Section XXI (Covenants by Plaintiff).

XXIV. ACCESS TO INFORMATION

104. Until ten (10) years after the Settling Defendants' receipt of EPA's notification pursuant to Paragraph 48 of Section XIV (Certification of Completion), Settling Defendants shall provide to EPA, upon request, copies of all documents and information in hardcopy or in

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1 electronic format or other format requested by EPA within their possession or control or that of
2 their contractors or agents relating to activities at the Head of the Hylebos Waterway Problem
3 Area or to the implementation of this Consent Decree, including, but not limited to, sampling,
4 analysis, chain of custody records, manifests, trucking logs, receipts, reports, sample traffic
5 routing, correspondence, or other documents or information (printed or electronic) related to the
6 Work. Notwithstanding the time frame provided in the preceding sentence, Settling Defendants
7 shall, upon request, provide copies of all documents and information in hardcopy or in electronic
8 format or other format requested by EPA within their possession or control or within the
9 possession or control of their contractors, consultants or agents relating to long-term operation,
10 maintenance and monitoring and other activities that may continue beyond Certification of
11 Completion of the Remedial Action under this Consent Decree. Settling Defendants shall also
12 make available to EPA, for purposes of investigation, information gathering, or testimony, their
13 employees, agents, or representatives with knowledge of relevant facts concerning the
14 performance of the Work.

15 105. Business Confidential and Privileged Documents.
16

17 a. Settling Defendants may assert business confidentiality claims covering
18 part or all of the documents or information submitted to Plaintiff under this Consent Decree to
19 the extent permitted by and in accordance with Section 104(e)(7) of CERCLA, 42 U.S.C.
20 § 9604(e)(7), and 40 C.F.R. § 2.203(b). Documents or information determined to be confidential
21 by EPA will be afforded the protection specified in 40 C.F.R. Part 2, Subpart B. If no claim of
22 confidentiality accompanies documents or information when they are submitted to EPA, or if
23 EPA has notified Settling Defendants that the documents or information are not confidential
24 under the standards of Section 104(e)(7) of CERCLA or 40 C.F.R. Part 2, Subpart B, the public
25
26

may be given access to such documents or information without further notice to Settling Defendants.

b. The Settling Defendants may assert that certain documents, records and other information are privileged under the attorney-client privilege or any other privilege recognized by federal law. If the Settling Defendants assert such a privilege in lieu of providing documents, they shall provide the Plaintiff with the following: (1) the title of the document, record, or information; (2) the date of the document, record, or information; (3) the name and title of the author of the document, record, or information; (4) the name and title of each addressee and recipient; (5) a description of the contents of the document, record, or information; and (6) the privilege asserted by Settling Defendants. However, no documents, reports or other information created or generated pursuant to the requirements of the Consent Decree shall be withheld on the grounds that they are privileged.

106. No claim of confidentiality shall be made with respect to any data, including, but not limited to, all sampling, analytical, monitoring, hydrogeologic, scientific, chemical, or engineering data, or any other documents or information evidencing conditions at or around the Hylebos Waterway Problem Area.

XXV. RETENTION OF RECORDS

107. Until ten (10) years after the Settling Defendants' receipt of EPA's notification pursuant to Paragraph 48 of Section XIV (Certification of Completion), each Settling Defendant shall preserve and retain all non-identical copies of records and documents (including records and documents in electronic form) now in its possession or control or which come into its possession or control that relate in any manner to its liability under CERCLA or the liability of any other person under CERCLA with respect to the Hylebos Waterway Problem Area. Each

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1 Settling Defendant must also retain, and instruct its contractors and agents to preserve, for the
2 same period of time specified above all non-identical copies of the last draft or final version of
3 any documents or records (including documents or records in electronic form) now in its
4 possession or control or which come into its possession or control that relate in any manner to the
5 performance of the Work, provided, however, that each Settling Defendant (and its contractors
6 and agents) must retain, in addition, copies of all data generated during the performance of the
7 Work and not contained in the aforementioned documents required to be retained. Each of the
8 above record retention requirements shall apply regardless of any corporate retention policy to
9 the contrary.

10 108. At the conclusion of this document retention period, Settling Defendants shall
11 notify the United States at least 90 days prior to the destruction of any such records or
12 documents, and, upon request by the United States, Settling Defendants shall deliver any such
13 records or documents to EPA. The Settling Defendants may assert that certain documents,
14 records and other information are privileged under the attorney-client privilege or any other
15 privilege recognized by federal law. If the Settling Defendants assert such a privilege, they shall
16 provide the Plaintiffs with the following: (1) the title of the document, record, or information;
17 (2) the date of the document, record, or information; (3) the name and title of the author of the
18 document, record, or information; (4) the name and title of each addressee and recipient; (5) a
19 description of the subject of the document, record, or information; and (6) the privilege asserted
20 by Settling Defendants. However, no documents, reports or other information created or
21 generated pursuant to the requirements of the Consent Decree shall be withheld on the grounds
22 that they are privileged.

23
24 109. Each Settling Defendant hereby certifies individually that, to the best of its
25 knowledge and belief, after thorough inquiry, it has not altered, mutilated, discarded, destroyed
26

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1 or otherwise disposed of any records, documents or other information (other than identical
2 copies) relating to its potential liability regarding the Hylebos Waterway Problem Area since
3 notification of potential liability by the United States or the filing of suit against it regarding the
4 Hylebos Waterway Problem Area and that it has fully complied with any and all EPA requests
5 for information pursuant to Section 104(e) and 122(e) of CERCLA, 42 U.S.C. 9604(e) and
6 9622(e), and Section 3007 of RCRA, 42 U.S.C. 6927.

7
8 XXVI. NOTICES AND SUBMISSIONS

9 110. Whenever, under the terms of this Consent Decree, written notice is required to be
10 given or a report or other document is required to be sent by one Party to another, it shall be
11 directed to the individuals at the addresses specified below, unless those individuals or their
12 successors give notice of a change to the other Parties in writing. All notices and submissions
13 shall be considered effective upon receipt, unless otherwise provided. Written notice as specified
14 herein shall constitute complete satisfaction of any written notice requirement of the Consent
15 Decree with respect to the United States, EPA and the Settling Defendants, respectively.

16 As to the United States:

17 Chief, Environmental Enforcement Section
18 Environment and Natural Resources Division
19 U.S. Department of Justice
20 P.O. Box 7611
21 Washington, D.C. 20044-7611
22 Re: DJ # 90-11-2-726

23 Chief, Environmental Defense Section
24 United States Department of Justice
25 Environment and Natural Resources Division
26 P.O. Box 23986
27 Washington D.C. 20026-3986
28 Re: DJ # 90-11-2-726

and

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Director, Environmental Cleanup Office
United States Environmental Protection Agency
Region 10
ECL - 113
1200 Sixth Avenue
Seattle, Washington 98101

As to EPA:

Peter Contreras
EPA Project Coordinator
United States Environmental Protection Agency
Region 10
ECL - 111
1200 Sixth Avenue
Seattle, Washington 98101

As to the Regional Financial Management Officer:

Ruth Broome
Office of Management and Planning
U.S. Environmental Protection Agency
OMP-146
1200 Sixth Avenue
Seattle, Washington 98101

As to the State of Washington:

Russ McMillan
State Project Coordinator
Site Cleanup Section
Toxics Cleanup Program
Department of Ecology
P.O. Box 47775
Olympia, WA 98504-7600

As to the Natural Resource Trustees:

Robert Taylor
Office of General Counsel
Damage and Restoration Center, N.W.
NOAA
U.S. Department of Commerce
7600 Sand Point Way, N.E.
BIN C15700
Seattle, WA 98115

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1 As to the Settling Defendants:

2 Settling Defendants' Project Coordinator
3 Dalton, Olmsted & Fugelvand, Inc.
4 10827 NE 68th Street, Suite B
5 Kirkland, Washington 98033-4000
6 Vice President of Health & Environmental
7 Safety
8 ATOFINA Chemicals, Inc.
9 2000 Market Street
10 Philadelphia, Pennsylvania 19103

11
12 Environmental Administrator
13 Schnitzer Steel Industries, Inc.
14 3200 Yean
15 Portland, Oregon 97210

16 XXVII. EFFECTIVE DATE

17 111. The effective date of this Consent Decree shall be the date upon which this
18 Consent Decree is entered by the Court, except as otherwise provided herein.
19

20 XXVIII. RETENTION OF JURISDICTION

21 112. This Court retains jurisdiction over both the subject matter of this Consent Decree
22 and the Settling Defendants for the duration of the performance of the terms and provisions of
23 this Consent Decree for the purpose of enabling any of the Parties to apply to the Court at any
24 time for such further order, direction, and relief as may be necessary or appropriate for the
25 construction or modification of this Consent Decree, or to effectuate or enforce compliance with
26 its terms, or to resolve disputes in accordance with Section XIX (Dispute Resolution) hereof.
27

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1 XXIX. APPENDICES

2 113. The following appendices are attached to and incorporated into this Consent
3 Decree:

4
5 "Appendix A" is the ROD and ESDs.

6
7 "Appendix B" is the SOW.

8 "Appendix C" is the description and/or map of the Hylebos Waterway Problem Area.

9
10 "Appendix D" is the description and map of the Head of the Hylebos Site.

11 XXX. COMMUNITY RELATIONS

12 114. Settling Defendants shall propose to EPA their participation in the community
13 relations plan developed by EPA. EPA will determine the participation role for the Settling
14 Defendants under the Plan. Settling Defendants shall also cooperate with EPA in providing
15 information regarding the Work to the public. As requested by EPA, Settling Defendants shall
16 participate in the preparation of such information for dissemination to the public and in public
17 meetings which may be held or sponsored by EPA to explain activities at or relating to the Head
18 of the Hylebos Site.

19
20 XXXI. MODIFICATION

21 115. Schedules specified in this Consent Decree for completion of the Work may be
22 modified by agreement of EPA and the Settling Defendants. All such modifications shall be
23 made in writing.
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116. Except as provided in Paragraph 12 ("Modification of the SOW or related Work Plans"), no material modifications shall be made to the SOW without written notification to and written approval of the United States, Settling Defendants, and the Court, if such modifications fundamentally alter the basic features of the selected remedy within the meaning of 40 C.F.R. 300.435(c)(2)(B)(ii). Prior to providing its approval to any modification, the United States will provide the State with a reasonable opportunity to review and comment on the proposed modification. Modifications to the SOW that do not materially alter that document, or material modifications to the SOW that do not fundamentally alter the basic features of the selected remedy within the meaning of 40 C.F.R. 300.435(c)(2)(B)(ii), may be made by written agreement between EPA and the Settling Defendants.

117. Nothing in this Decree shall be deemed to alter the Court's power to enforce, supervise or approve modifications to this Consent Decree.

XXXII. LODGING AND OPPORTUNITY FOR PUBLIC COMMENT

118. This Consent Decree shall be lodged with the Court for a period of not less than thirty (30) days for public notice and comment in accordance with Section 122(d)(2) of CERCLA, 42 U.S.C. § 9622(d)(2), and 28 C.F.R. § 50.7. The United States reserves the right to withdraw or withhold its consent if the comments regarding the Consent Decree disclose facts or considerations which indicate that the Consent Decree is inappropriate, improper, or inadequate. Settling Defendants consent to the entry of this Consent Decree without further notice.

119. By executing this Consent Decree, and taking action under this Consent Decree, Settling Defendants do not intend to amend or alter any previously existing contractual agreement between or among any of the Settling Defendants. By executing this Consent Decree, and taking action under this Consent Decree, the United States and Settling Defendants do not

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1 intend to amend or alter the General Metals AOC or Site Control Plan, which is incorporated as
2 an attachment to the SOW.

3
4 120. If for any reason the Court should decline to approve this Consent Decree in the
5 form presented, this agreement is voidable at the sole discretion of any Party and the terms of the
6 agreement may not be used as evidence in any litigation between the Parties.

7 XXXIII. SIGNATORIES/SERVICE

8
9 121. Each undersigned representative of a Settling Defendant to this Consent Decree
10 and the Assistant Attorney General for the Environment and Natural Resources Division of the
11 Department of Justice certifies that he or she is fully authorized to enter into the terms and
12 conditions of this Consent Decree and to execute and legally bind such Party to this document.

13 122. Each Settling Defendant hereby agrees not to oppose entry of this Consent Decree
14 by this Court or to challenge any provision of this Consent Decree unless the United States has
15 notified the Settling Defendants in writing that it no longer supports entry of the Consent Decree.

16 123. Each Settling Defendant shall identify, on the attached signature page, the name,
17 address and telephone number of an agent who is authorized to accept service of process by mail
18 on behalf of that Party with respect to all matters arising under or relating to this Consent Decree.
19 Settling Defendants hereby agree to accept service in that manner and to waive the formal service
20 requirements set forth in Rule 4 of the Federal Rules of Civil Procedure and any applicable local
21 rules of this Court, including, but not limited to, service of a summons. Settling Defendants need
22 not file an answer to the complaint in this action unless or until the court expressly declines to
23 enter this Consent Decree.
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XXXIV. FINAL JUDGMENT

124. This Consent Decree and its appendices constitute the final, complete, and exclusive agreement and understanding among the parties with respect to the settlement embodied in the Consent Decree. The parties acknowledge that there are no representations, agreements, or understandings relating to the settlement other than those expressly contained in this Consent Decree.

125. Upon approval and entry of this Consent Decree by the Court, this Consent Decree shall constitute a final judgment between and among the United States and the Settling Defendants. The Court finds that there is no just reason for delay and therefore enters this judgment as a final judgment under Fed. R. Civ. P. 54 and 58.

SO ORDERED THIS __ DAY OF _____, 20__.

United States District Judge

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1 THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of United States v.
2 ATOFINA Chemicals, Inc., et al., relating to the Hylebos Waterway Problem Areas within the
3 Commencement Bay Nearshore/Tideflats Superfund Site.

4
5 **FOR THE UNITED STATES OF AMERICA**

6
7 5.14.04

8 Date

9 Thomas L. Sansonetti
10 Assistant Attorney General
11 Environment and Natural Resources Division

12 Date

13 Michael McNulty
14 Environmental Enforcement Section
15 Environment and Natural Resources Division
16 U.S. Department of Justice
17 P.O. Box 7611
18 Washington, D.C. 20044-7611
19 (202) 514-1210

20 Date

21 Brian Kipnis
22 Assistant United States Attorney
23 Western District of Washington
24 601 Union Street
25 Suite 5100
26 Seattle, WA 98101
27 (206) 553-7970

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2 ATOFINA Chemicals, Inc., et al., relating to the Hylebos Waterway Problem Areas within the
3 Commencement Bay Nearshore/Tideflats Superfund Site.

4
5
6 Date

John Iani
Regional Administrator, Region 10
U.S. Environmental Protection Agency
1200 Sixth Avenue
Seattle, Washington 98101

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11 Date

Ted Yackulic
Assistant Regional Counsel
U.S. Environmental Protection Agency
Region 10
ORC-158
1200 Sixth Avenue
Seattle, Washington 98101

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2 ATOFINA Chemicals, Inc., et al., relating to the Hylebos Waterway Problem Areas within the
3 Commencement Bay Nearshore/Tideflats Superfund Site.

4 FOR ATOFINA CHEMICAL, INC.

5
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8 _____
9 Date

Signature: _____

Name (print): _____

Title: _____

Address: _____

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13 Agent Authorized to Accept Service on Behalf of Above-signed Party:

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16 Name (print): _____

Title: _____

17 Address: _____
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2 ATOFINA Chemicals, Inc., et al., relating to the Hylebos Waterway Problem Areas within the
Commencement Bay Nearshore/Tideflats Superfund Site.

3 **FOR GENERAL METALS OF TACOMA, INC.**

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8
9 Date _____

Signature: _____

Name (print): _____

Title: _____

Address: _____

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13 Agent Authorized to Accept Service on Behalf of Above-signed Party:

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